Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1751

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

THOMAS CONYERS,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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To: The Honorable Chief Justice
and the Associate Justices
of the Supreme Court:

The petitioner, the State of New York, respectfully prays that a writ of certiorari issue to review the January 8, 1980 opinion of the Court of Appeals of the State of New York in the above case.

Opinions Below

The opinion of the Court of Appeals is reported at 49 N.Y.2d 174, 400 N.E.2d 342, 424 N.Y.S.2d 402 (1980) and is also set forth as Appendix A. The order and opinion of the New York Supreme Court, Appellate Division is reported at 65 A.D.2d 437, 411 N.Y.S.2d 303 (1st Dept. 1978) and is also set forth as Appendix C.

Jurisdiction

On January 8, 1980, the New York State Court of Appeals affirmed an order of the New York Supreme Court Appellate Division, First Department reversing respondent's conviction. The court, in a 4-3 decision held that respondent's right to due process of law, and his privilege against self-incrimination, had been violated when the prosecutor cross-examined him about his silence at the time of arrest. The prosecutor's inquiry had focused on respondent's failure immediately to tell the officer who arrested him at the scene of the crime and did not give him *Miranda* warnings, the exculpatory story to which respondent testified at trial.

In its decision, the Court of Appeals referred to both the federal and state constitutional privilege against self-incrimination and right to due process. Despite these references to the State Constitution, it was clear that the court had affirmed the reversal of respondent's conviction on constraint of this Court's decisions interpreting the Fifth and Fourteenth Amendments. Consequently, petitioner moved to have the court amend its remittitur to reflect that it had

necessarily passed upon federal constitutional questions. In opposing that motion, respondent argued that the federal authorities referred to by the majority were discussed in only general terms, and were not necessary to its judgment, which was solely on state grounds. The court rejected respondent's argument and on March 20, 1980, it amended its order to reflect that it had necessarily passed upon a question under the Constitution of the United States (The amended remittitur is set forth as Appendix B).

On March 27, 1980, Mr. Justice Marshall signed an order extending the time for filing the petition for certiorari to and including May 5, 1980. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Question Presented

When a defendant, who was arrested as he fled from his robbery victim and was not given *Miranda* warnings, testifies at trial that he was the victim rather than the perpetrator of the crime charged, is it a violation of due process or the privilege against self-incrimination to cross-examine defendant about his failure immediately to tell that story to the arresting officer?

Constitutional Provisions Involved

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * compelled in any criminal case to be a witness against himself.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Statement of the Case

The Evidence at Trial

At approximately 1:30 p.m. on August 28, 1975, Mr. Marion Dantzler and Mrs. Grace Johnson were standing and talking in front of an apartment building in Manhattan, when they were approached by the respondent, Thomas Conyers, and his co-defendant below, Arthur Saunders. Conyers and Saunders ordered Dantzler and Johnson into the hallway of the building and, once inside, Saunders drew a pistol. Conyers and Saunders then stole money from Dantzler's pocket and a small purse containing cash from Johnson. They tied Johnson's and Dantzler's hands and feet, forced them to lie down, and ran from the building. As the defendants fled from the building, Dantzler untied himself and ran in pursuit.

Dantzler chased the defendants for one block. He then enlisted the aid of a tow truck operator who drove Dantzler one more block where Dantzler resumed his chase on foot. During the brief chase, one of the defendants fired a gun at Dantzler without hitting him. As the chase continued, Saunders appeared to hand the gun to Conyers who, moments later, was apprehended by a police officer who seized the gun. Saunders continued to run for another block until he too was stopped by an officer. Both defendants were brought to the precinct where they were identified by Dantz-

ler and Johnson. A piece of rope resembling one found on Dantzler's wrist was seized from Saunders, and a black vinyl purse containing cash was recovered from Conyers.

For the first time at trial, Conyers testified that far from being the aggressor, he was the innocent victim of Marion Dantzler's attempt to cheat him out of a gambling debt by threatening him with a gun. According to Conyers, Dantzler had initially offered to pay the debt by telling Conyers to take the money contained in a black vinyl change purse in Dantzler's apartment. However, when Conyers reached for the purse, Dantzler drew a gun. As Conyers grabbed the gun from Dantzler, it accidentally discharged. Conyers seized the gun and the change purse, and Saunders tied Dantzler's hands. They then fled from the apartment to the street.

Shortly after Conyers and Saunders reached the street, they heard Dantzler shouting and chasing after them. Conyers testified that as he ran from Dantzler, he saw a police car parked ahead. Conyers then heard Dantzler call out to the police that he, Dantzler, had been robbed. Conyers dropped the gun as he was stopped by the police.

On cross-examination, the prosecutor asked Conyers whether he had run toward the police car when he first saw it. Conyers said that he had not. She then asked Conyers if he had ever told the police that he had seized the gun from Dantzler in self defense (Trial Transcript, herein set forth at Appendix D, p. 43a). Defense counsel objected to the question on the ground that "Defendant is advised of his right not to talk to the police." (There was no testimony that defendant had received the *Miranda* warnings.)

Following a bench conference, the trial court overruled counsel's objection (App. D, pp. 43-44a). Conyers answered that he had never told this story to the police. The prosecutor then asked Conyers if he had ever attempted to press charges against Dantzler. Again, over objection, he gave a negative response (App. D, p. 45a). In summation, to which an exception was subsequently taken and overruled, the prosecutor argued that Conyers' responses to these questions demonstrated the falsity of his trial story (App. D, pp. 44-46a).

On March 16, 1976 the jury convicted defendant of robbery and related crimes.

The State Appellate Proceedings

Relying exclusively upon *Doyle* v. *Ohio,* 426 U.S. 610 (1976), the Appellate Division, First Department held that the prosecutor's cross-examination and summation deprived respondent of his federal constitutional right to due process, and penalized him for exercising his Fifth Amendment right to remain silent "when he [was] under police custodial interrogation" *People* v. *Conyers* (App. C, p. 40a).

On appeal to the New York State Court of Appeals, petitioner argued that, when respondent testified at trial that he was the victim rather than the perpetrator of the crime charged, he could be asked about his failure to tell that story to his arresting officer. Petitioner contended that this Court's decision in *Doyle* v. *Ohio,* 426 U.S. 610 *supra* did not preclude such cross-examination because *Doyle* con-

cerned a defendant who had been given *Miranda* warnings at the time of his arrest, and who therefore had a right to believe that his silence would not be used against him. Respondent, however, was arrested on the street while fleeing from his victim. At the time he was arrested, the police had not yet had an opportunity to give him *Miranda* warnings. Consequently, unlike *Doyle,* respondent had not been encouraged by the police to remain silent or led by them to believe that his silence would not be used against him.

In a 4-3 decision, the New York Court of Appeals affirmed the order of reversal. The majority held that respondent's Fourteenth Amendment right to due process of law and his Fifth Amendment privilege against self-incrimination had been violated by cross-examining him about his silence at the time of arrest.* The dissenting judges argued that neither the due process clause nor the privilege against self-incrimination prohibited the contested cross-examination. According to the dissenters, to refuse to permit the jury to consider respondent's failure to exculpate himself at the time of arrest is "to provide defendants with a license to lie . . ." (App. A, p. 13a). The dissenters went on to distinguish this case from *Doyle,* and said that there is no unfairness when *Miranda* warnings have not been given.

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* Although the court's opinion cited both the State and Federal Constitutions it subsequently amended its remittitur to reflect that the decision was controlled by resolution of the federal constitutional questions. (See p. 3 *supra* and App. B, p. 32a).

Reasons for Granting the Writ

There were two distinct bases for the New York Court of Appeals decision in this case: First, the court held that it is fundamentally unfair to ask a criminal defendant who testifies at trial that he was the victim rather than the perpetrator of the crime charged, why he did not tell that story to his arresting officer. According to the court, such cross-examination is a violation of due process even if the defendant had not yet been made aware of his right to silence by *Miranda* warnings at the time of arrest. Second, the court ruled that cross-examination about post-arrest silence unconstitutionally penalizes a person for exercising the privilege against self-incrimination. As shown below, this case raises substantial constitutional issues, resolution of which will affect profoundly the administration of justice in New York.

(1) In 1974, the New York Court of Appeals held unanimously that a police officer, on trial for bribery, could be cross-examined about his post-arrest silence. *People* v. *Rothschild,* 35 N.Y.2d 355, 320 N.E.2d 639, 361 N.Y.S.2d 901 (1974). Yet, in its due process discussion, the court did not even attempt to distinguish this case from its decision in *Rothschild* (*see* App. A, p. 4a). It simply pointed to *Doyle* v. *Ohio,* 426 U.S. 610 *supra* as a "subsequent refinement in criminal law and practice" which "impelled" it to re-examine *Rothschild* (*id.*).

The majority reasoned that a person who is taken into custody at the scene of the crime is aware of his right to remain silent even if that awareness does not come from

explicit warnings. Consequently, it would be fundamentally unfair to give a defendant the right of silence, and then to penalize his exercise of that right by permitting the prosecutor at trial to ask the defendant about his silence at the time of arrest.

Clearly then, the Court of Appeals abandoned a six year-old precedent on the basis of its interpretation of this Court's decision in *Doyle* v. *Ohio, supra.** *Doyle,* however, concerned a defendant who had been given his warnings when he was arrested. This Court held that it would be a violation of due process to advise a defendant of his right to remain silent and then to use that silence against him for impeachment purposes. Here, the respondent was arrested while fleeing from his victim. In the immediacy of the circumstances of a street arrest, the police did not advise him of his right to remain silent.

Notwithstanding that respondent, unlike *Doyle,* had not been encouraged to remain silent by police warnings, the court below held that this Court's decision in *Doyle* prohibited cross-examining respondent about his silence when first confronted the police. The majority asserted that even in the absence of explicit warnings, the right to silence is a "matter of common knowledge."** Hence, according

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* In petitioner's motion to have the Court of Appeals amend its remittitur, we pointed out that the sole basis for the court's having abandoned the precedent of *Rothschild* was the decision in *Doyle* v. *Ohio, supra.* The court thereafter acknowledged that *Doyle* was the predicate for its due process holding by amending its remittitur as requested.

** The majority's reference to the "common knowledge" of the right to remain silent is curious, because the very premise of this Court's decision in *Miranda* v. *Arizona,* 384 U.S. 436, 468-69 (1966), is that it cannot be presumed that a defendant knows his rights when arrested. *See also People* v. *Conyers,* App. A, p. 16a (Meyer, J. dissenting).

to the court below, due process is violated anytime silence at the time of arrest is used for impeachment purposes. This reasoning goes far beyond the holding in *Doyle* and thus presents this Court with an opportunity to itself define the scope of its decision in *Doyle*.

Indeed, this case is a logical one for the Court to review in view of the presently pending case of *Jenkins* v. *Anderson*, No. 78-6809, 26 CrL 4160 (argued 1/8/80). *Jenkins* raises the issue of whether due process was violated when a defendant in a murder case was cross-examined and the prosecutor commented in summation about his failure to come forward to the police with his self-defense story between the time of the killing, and defendant's voluntary surrender some two weeks later. If this Court holds that such cross-examination does not violate due process, it should then grant certiorari in this case rather than remanding it for consideration in light of the decision in *Jenkins*.

The reason for not remanding this case, is that it presents the last of three recurring factual situations involving an accused's silence and subsequent cross-examination about that silence. The first, pre-custody silence, is the situation which will be addressed in *Jenkins*. The second, post-arrest silence after *Miranda* warnings have been given, is the situation addressed in *Doyle*. The third and last situation involves silence at the time of arrest before the police have had an opportunity to give *Miranda* warnings. That is the situation which is presented by this case. By granting certiorari, this Court can decide whether, in that final factual situation, due process precludes cross-examining a defendant about his silence at the time of arrest.*

* Even if the Court holds in *Jenkins* v. *Anderson*, *supra*, that the defendant's due process rights were violated by cross-examining him regarding his pre-custody silence, we respectfully request that we be given an opportunity to demonstrate why certiorari should nonetheless be granted in this case.

Notably, the immediate street arrest of a person who has just committed a crime occurs daily in New York City alone. And at trial, there is a recurring scene of that person telling a story which could be better evaluated by the jury if they knew that this story had not been told to the police at arrest. *See, e.g., People* v. *Adams,* 73 A.D.2d 525, 422 N.Y.S.2d 406 (1st Dept. 1979); *People* v. *Streeter,* 67 A.D.2d 877, 413 N.Y.S.2d 690 (1st Dept. 1979); *see also People* v. *Antonio Urbina,* Ind. No. 0798/76 (appeal pending before Appellate Division, First Department). Certainly, it is a provident exercise of certiorari jurisdiction to determine whether the New York Court of Appeals was correct when it concluded that this Court's decisions mandated that: criminal defendants be permitted to take the stand and offer a completely fabricated exculpatory story without fear that they will be asked about their failure to have told that story to the arresting officer.

(2) Independent of the due process rationale, the New York Court of Appeals precluded the cross-examination in issue for a second reason (*see* App. A, p. 8a, fn. 2). The court held that use of respondent's silence at the time of arrest penalized him for exercising his Fifth Amendment privilege against self-incrimination.*

The court's holding represents a substantial and novel expansion of the privilege.** First, as noted by the dissenters, the privilege protects against compulsory self-incrimination (App. A, p. 14a). Here it is difficult to see

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* Significantly, this Court expressly declined to rest its decision in *Doyle* v. *Ohio* on the Fifth Amendment (see 426 U.S. at 616 fn. 6; *see also id.* at 620 and 626 [Stevens, J. dissenting]).

** The holding may also be in conflict with this Court's decision in *Raffel* v. *United States,* 271 U.S. 494 (1926). (*See* 426 U.S. at 628 [Stevens, J. dissenting].) The majority below took parenthetical note of *Raffel,* but did not discuss it other than with a "Cf." (App. A, p. 11a).

the compulsion which would give rise to a violation of the Fifth Amendment.

The majority below seemed to find the compulsion by reasoning that if defendants who testify at trial can be cross-examined about their silence at the time of arrest, persons will be forced into the intolerable position of having to choose between speaking when arrested and possibly incriminating themselves, or remaining silent and risk having their silence subsequently used against them at trial. To support their argument, they relied upon *Griffin* v. *California,* 380 U.S. 609 (1965). *Griffin,* however, concerned prosecutorial comment at trial on defendant's failure to take the stand. Such comment, held this Court, "is a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Id.* at 614.

To be sure, in a trial situation, a defendant may well feel compelled to testify and waive his privilege solely to rebut the inference of guilt inherent in prosecutorial comment on his failure to testify. By contrast, it is difficult to believe that a person in custody rather than saying nothing will feel compelled to speak up because he is somehow aware that if he subsequently testifies at trial, he may be called upon to explain his silence. Put simply, it is difficult to see how cross-examination at trial about post-arrest silence will "cut down on the privilege" at the time of arrest.*

* The majority below balanced the probative value of respondent's silence against the burden on the exercise of the privilege. It held that the probative value was outweighed by the penalty imposed on the privilege (App. A, pp. 8-11a). Yet, even if allowing cross-examination about prior silence would place some burden on the defendant's choice to remain silent, not every burden on the exercise of a constitutional right is impermissible. *See, e.g., McGautha* v. *California,* 402 U.S. 183, 210-13, 217 (1971); *Williams* v. *Florida,* 399 U.S. 78, 83-4 (1970).

That the Fifth Amendment issue is a substantial one is demonstrated by the pending case of *Jenkins* v. *Anderson*, No. 78-6809, *supra*. There, the Court is considering whether cross-examination and summation about a defendant's pre-custody silence violates the Fifth Amendment. If the Court holds that Jenkins's Fifth Amendment rights were not violated, it should nonetheless review this case and not remand it in light of *Jenkins*.*

Review rather than remand is appropriate because as discussed earlier, there are three recurring factual situations in which impeaching a defendant with his silence may violate the privilege against self-incrimination: Pre-custody silence, as in *Jenkins;* post-arrest silence after *Miranda* warnings have been given, as in *Doyle;* and post-arrest silence where there has not been an opportunity to give *Miranda* warnings, as in this case (*see* p. 10, *supra*). After the *Jenkins* decision, there will remain only the third situation. This case thus presents an ideal fact pattern on which to resolve the remaining substantial Fifth Amendment issue with respect to the use of silence. And, as in the due process situation, the New York Court of Appeals's conclusion about this Court's view of the Fifth Amendment, will severely hamper the administration of justice in New York (*see* p. 11 *supra*).

* * *

In sum, this case presents two related constitutional questions: First, where an arrested person who has not been advised of his right to remain silent testifies to an

* Again, even if the Court holds in *Jenkins* that the defendant's privilege against self-incrimination was violated, we respectfully request an opportunity to demonstrate why this case nonetheless calls for a grant of certiorari.

exculpatory version of events at trial, is it a violation of due process to ask him about his failure to tell a similar story at the time of arrest before he had been advised of his rights? Second, is such silence "compelled" so that its use for impeachment purposes violates the privilege against self-incrimination? These questions have not been addressed by this Court and they concern a situation common to criminal prosecutions throughout the United States.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1980

Appendices

APPENDIX A

Opinion of the New York State Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

vs.

THOMAS CONYERS,
Respondent.

decided January 8, 1980

GABRIELLI, J.

Thomas Conyers was convicted in Supreme Court, New York County, of several crimes allegedly committed during and immediately following the armed robbery of Marion Dantzler and Grace Johnson. During his trial, Conyers testified on his own behalf that in fact there had been no robbery and gave a description of the events leading to his arrest which differed significantly from that provided by Dantzler and Johnson. The prosecutor was allowed to cross-examine Conyers, over a timely defense objection, concerning his failure to inform the police of his version of the incident at the time of his arrest. Conyers' silence was also the object of comment by the prosecutor during summation. Upon defendant's appeal to the Appellate Division, that court concluded that Conyers was deprived of a fair trial because of the inquiry into his assertion of

his right to remain silent. Accordingly, the Appellate Division reversed the judgment of conviction and ordered a new trial. The People now appeal to this court. For the reasons discussed below, we conclude that there must be an affirmance.

At issue on this appeal is the propriety of prosecutorial use, for impeachment purposes only, of a defendant's silence at the time of arrest. We note that it has long been and remains the law in this State that a defendant's silence cannot be used by the People as a part of their direct case (*People v Rutigliano,* 261 NY 103). Thus, our inquiry today is limited to the use of a defendant's silence for impeachment purposes when that defendant testifies at his trial. We are persuaded that a defendant's silence at the time of his arrest may not be used against him even for impeachment purposes, since such use would violate due process and would improperly penalize a defendant for the assertion of a basic constitutional right.

The course of events which culminated in defendant's arrest was the subject of considerable dispute at his trial. Dantzler and Grace testified that Conyers and a codefendant, Arthur Saunders, had accosted them on a New York City street and forced them at gunpoint into the hallway of a nearby apartment building, where Dantzler and Grace were robbed and bound. Dantzler managed to escape his bonds, and gave chase to Conyers and Saunders. In the course of that pursuit, one of the defendants fired a shot at Dantzler. The chase ended with the arrival of the police, who immediately arrested Conyers and Saunders. There were no other witnesses to the alleged robbery itself, al-

though several witnesses did support parts of Dantzler's description of the chase.

Both Saunders and Conyers testified at their joint trial.[1] Their version of the incidents preceding their arrest was somewhat different from the tale told by Dantzler and Johnson. According to the defendants, they had visited Dantzler in his apartment in order to collect Conyers' winnings on a bet placed with Dantzler the previous day. An argument developed over whether Conyers was entitled to the money, and eventually Dantzler pointed to a pouch on a table and told Conyers to take the money in the pouch. As Conyers reached for the pouch, Dantzler drew a gun, which Conyers then kicked out of his hands. Conyers and Saunders bound Dantzler and left the building with the pouch and the gun. They soon noticed Dantzler chasing them, and began to run until they were stopped by the police.

The prosecutor sought to discredit the defendants' explanation of their encounter with Dantzler as being a recent fabrication. To this end, Conyers was cross-examined about his failure to explain the situation to the police when he was arrested. A defense objection to this line of questioning was overruled, and the prosecutor subsequently referred to Conyers' silence during summation. Defendant contends that his assertion of the right to remain silent at the time of his arrest should not have been used against him even for impeachment purposes. We agree.

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1. Saunders was also convicted, but his conviction was affirmed by the Appellate Division and leave to appeal to this court was denied (*People v Saunders*, 63 AD2d 868, mot for lv to app den 44 NY2d 956). We note that the issues presented on this appeal were not raised by Saunders on his appeal.

Proceeding immediately to the central legal dispute presented by this appeal, initially we recognize that in *People v Rothschild* (35 NY2d 355) we sustained the larceny conviction of a police officer although the People had been allowed to cross-examine the officer concerning his silence at the time of his arrest in an attempt to impeach his claim at trial that he had been engaged in a police undercover operation and had not actually been seeking to obtain money illegally. While the *Rothschild* case might at first glance seem to resolve the instant dispute, we note that the circumstances surrounding that case were unusual since the officer was under a duty to inform his superiors of his undercover activities, and thus his continued silence in the face of accusation by his fellow officers was extraordinarily probative. Since our decision in *Rothschild,* we have expressly stated that "[t]he fact that a defendant is silent at the time of arrest may not be used to impeach him at trial" (*People v Arce,* 42 NY2d 179, 187). Moreover, the Supreme Court has recently concluded that the use of silence to impeach the testimony of a defendant who was given the warnings mandated by *Miranda v Arizona* (384 US 436) is violative of due process (*Doyle v Ohio,* 426 US 610). Hence, we are impelled to re-examine our decision in *Rothschild* in light of subsequent refinements in criminal law and practice.

In *Doyle v Ohio* (426 US 610, *supra*), the Supreme Court held that where a defendant has been provided with the warnings mandated by *Miranda,* and thus has been impliedly promised that his silence would not be used against him, it would be fundamentally unfair to then allow that silence to in fact be used to the detriment of the accused even for

the limited purpose of impeachment. In the instant case, it would appear that the police failed to provide Conyers with *Miranda* warnings. The People suggest that this factual distinction justifies a different result. In esssence, the prosecution argues that where *Miranda* warnings have not been given, the accused does not receive any implied promise that his silence will not be used against him, and thus the use of that silence for impeachment purposes does not run afoul of any concept of fundamental fairness and is not violative of due process. We disagree. It would appear rather anomalous to "reward" improper police practices by allowing the existence of such impropriety to serve as the justification for admitting evidence otherwise inadmissible. Although *Miranda* does not mandate suppression of statements made by an accused who has not been informed of his rights if those statements have not been elicited by police interrogation, it remains good practice to inform an accused of his rights as soon as is possible. More significantly, the implied promise, contained in the *Miranda* warnings, that one's silence will not be used against one, is derived not from the words of the *Miranda* warnings, but from the actual constitutional guarantees which they express. Thus, regardless whether that promise is repeated by the police in the form of *Miranda* warnings, each and every citizen has already been made just such a promise by the State. That promise is contained in the privilege against self incrimination provided by both the Federal and State Constitutions (US Const, 5th Amdt; NY Const, art I, § 6). The State has promised each of its citizens, by ratification of those constitutional provisions, that he may remain silent in the face of accusation. Having made that promise, the State may

not, consistent with any concept of fundamental fairness and due process, subsequently renege on that promise by utilizing a defendant's silence against him. The implied promise made to a suspect when he is given *Miranda* warnings merely repeats and reiterates the promise already made by both our Constitutions. Although it is necessary to repeat that promise in order to ensure that the suspect fully understands his constitutional rights, the failure of the police to do so does not serve to prevent a suspect from relying upon that promise. Moreover, it is a matter of common knowledge that a person who is arrested is not required to speak to the police, and that his silence may not be used against him. This is not an arcane legal principle known only to the learned, but rather is familiar to most citizens. For purposes of a due process analysis based on the unfairness of capitalizing upon the accused's accurate appreciation and exercise of his basic constitutional rights, we deem it irrelevant whether that knowledge was imparted by the police, as is required by law, or was absorbed from our common culture (see, also, *Douglas v Cupp,* 578 F2d 266, cert den 439 US 1081). In short, we conclude that the use for impeachment purposes of an accused's silence at the time of his arrest is violative of due process.

There exists, moreover, another reason for precluding use of a defendant's silence for impeachment purposes. It is basic to our system of criminal justice that an accused may not be compelled to incriminate himself (US Const, 5th Amdt; NY Const, art I, § 6). While proper application of this principle may vary with the context in which it is sought to be utilized, there can be no doubt but that at the

most basic level it provides an accused with the right to remain silent in the face of interrogation or accusation. Any attempt to penalize a person for the exercise of this fundamental right must be scrutinized with extreme care. It is for this reason that in New York it has long been the law that evidence of silence at the time of an arrest may not be used as a part of the prosecution's direct case. As we declared in *People v Rutigliano* (261 NY 103, 107, *supra*), "No cautious person, when in custody accused of crime would care to enter into a discussion of his guilt or innocence with his captors and co-defendants, when what he said might be used against him * * * He is then under no duty to speak and his silence should not be counted as giving assent to what he hears. If he had counsel, he would doubtless be advised not to talk. If he had not, he should not be prejudiced thereby".

Similarly, in *Griffin v California* (380 US 609) the Supreme Court forbade comment during trial about a defendant's decision to exercise his privilege against self incrimination by not taking the stand on his own behalf. The court found such commentary to be objectionable because "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly" (380 US, at p 614).

These cases, of course, do not resolve the controversy concerning use of a defendant's silence at the time of arrest to impeach his credibility, for in both *Griffin* and *Rutigliano* the defendant's decision to exercise his privilege was sought to be used as a part of the direct prosecution case, not merely for impeachment purposes. The State's interest in preventing perjury is a great one, and the use of a defend-

ant's silence for impeachment purposes imposes less of a toll upon the exercise of the privilege than does the use of that silence as proof of guilt. Thus, a distinction may validly be made between such cases. The considerations underlying both *Rutigliano* and *Griffin,* however, remain applicable, although to a different extent, when an attempt is made to utilize a defendant's silence for purposes of impeachment.

Thus, absent unusual circumstances such as those presented in the *Rothschild* case, we cannot countenance the use of silence even for impeachment purposes.[2] In the typical case, the probative value of such evidence will be minimal (see *United States v Hale,* 422 US 171, 176-177), and yet its prejudicial effect may be considerable. Although, as noted above, the State does have an interest in preventing perjury so strong that it may at times outweigh the somewhat attenuated interests of a defendant in preventing the use of his silence for impeachment purposes, this can be so only if the facts of the particular case are such that the defendant's silence has an unusually high probative value. In most cases, such as this one, silence when arrested is essentially ambiguous. The innocent suspect, as well as the guilty, is free to refrain from discussing the intricacies of his case with an arresting officer. Contrary to the opinion expressed by the dissent, we find no necessary contradiction between innocence and the decision to await a somewhat calmer moment and a more sympathetic audience before speaking.

2. It should be emphasized that this is an alternative basis for our decision in this case, since the due process considerations discussed previously would in all cases prevent the use of silence for impeachment purposes.

A suspect may well believe that it would be useless to attempt to justify his apparently criminal behavior to the arresting officer. For example, in the instant case, defendant was stopped with gun in hand following a running street battle. The likelihood that any explanation for his behavior could have then prevented an arrest was minimal at best. Hence, to speak may well have appeared futile to defendant. Moreover, it is an unfortunate truth that many people in our society, especially those involved in the life of the street, view the police as antagonists rather than protectors and react to police contact with extreme suspicion, distrust, and lack of cooperation. Such people will often believe, rightly or wrongly, that nothing they might say to the police on their own behalf would be accepted. Conversely, one who has had little or no dealings with the police might well be too shaken by the encounter to immediately raise a valid explanation, especially when the surrounding circumstances create the strong appearance of guilt. In short, the possible explanations for silence are many and varied, and a failure to speak, absent unusual circumstances, is as consistent with innocence as guilt. Because of the low probative value which may reasonably be attached to silence, the State's interest in utilizing that evidence for impeachment purposes is correspondingly weakened and will not justify the imposition of even so attenuated a penalty on the exercise of a defendant's right to remain silent (see Comment, Impeaching a Defendant's Trial Testimony by Proof of Post-Arrest Silence, 123 U of Pa L Rev 940, 974).

It is, of course, true that statements made by a defendant who has not been given *Miranda* warnings at the time

of arrest may nonetheless be used by the prosecution for impeachment purposes should the defendant take the stand on his own behalf (see *Harris v New York,* 401 US 222). While this rule implies the validity for constitutional purposes of distinguishing between the use of evidence as a part of the prosecution's direct case and the use of evidence for impeachment purposes only, it is certainly not contrary to the principle we enunciate today. This is so for several reasons. First, an inconsistent statement is much more probative than is silence. Moreover, a defendant's decision to remain silent at the time of arrest is in and of itself an assertion of a basic constitutional privilege. Thus, to allow that silence to be used against a defendant is to place a burden upon the direct exercise of a fundamental right. The *Miranda* warnings, on the other hand, constitute a prophylactic device designed to prevent constitutional violations and to protect the rights of an accused. In the absence of any actual coercion, a statement made by a defendant who has not been informed of his rights is not inherently suspect, nor does the use of such a statement against a defendant penalize that defendant for the exercise of a constitutionally protected right. Since the use for impeachment purposes of a statement made in the absence of *Miranda* warnings does not penalize an accused for the assertion of a constitutional right, whereas the use of a defendant's silence even for impeachment purposes only would burden the exercise of the defendant's privilege against self incrimination, it is appropriate to allow the use of such statements for impeachment purposes while precluding similar use of a defendant's silence.

In short, unless the introduction of evidence pertaining to a defendant's silence for impeachment purposes would materially advance the search for truth, it cannot be deemed to serve a sufficiently substantial State interest to justify the imposition of a penalty for the exercise of a constitutional right. In the typical case, as here, silence at the time of arrest will simply be too ambiguous to provide such a basis (see *United States v Hale,* 422 US 171, *supra;* cf. *Raffel v United States,* 271 US 494). Hence, we conclude that the use of defendant's silence for impeachment constituted an impermissible penalty for the exercise of his privilege.

Finally, we must reject the People's argument that the use of defendant's silence for impeachment purposes constituted harmless error at worst. Although there existed other evidence which might sustain a finding of guilt by the jury, it is evident that the nature and extent of the encounter between the defendants and their alleged victims was basic to the determination of guilt or innocence. The jury was presented with a pointed issue of credibility and was required to believe either the defendants or the prosecution witnesses. In this context, any evidence tending to impeach Conyers' credibility was extremely significant and may well have had a considerable influence upon the jury. Hence, even were we to find harmless error analysis to be appropriate in a case of this nature, in the absence of curative instructions we must conclude that in this case there is a reasonable possibility that this constitutional error contributed to defendant's conviction (see *People v Crimmins,* 36 NY2d 230, 240-241).

Accordingly, the order directing a new trial should be affirmed.

MEYER, J. (dissenting). Because the majority departs from the precedent established in *People v Rothschild* (35 NY2d 355) and does so on the wholly untenable basis that defendant's silence when arrested was too ambiguous to "materially advance the search for truth" (p 183; see, also, p 181), I respectfully dissent.

By its decision today the majority leaves the status of *Rothschild* unclear, for though it appears to have ruled that impeachment by silence remains permissible in the circumstances of *Rothschild* (p 181) it also speaks of re-examining *Rothschild* in the light of later Supreme Court cases (p 179), and its holding, if it does not establish a per se rule, necessarily limits *Rothschild* to *sui generis* status as a precedent. In my view neither the due process clause nor the privilege against self incrimination requires the result reached.[1] The right to impeach a defendant by his silence at the time of arrest should turn, as does the right to impeach him by prior criminal convictions, on a balancing of the prejudice to defendant on the one hand and the probativeness of his silence as a measure of his credibility on the other.[2] Here we deal not with silence in the face of

1. While the majority cites both Federal and State due process and self incrimination provisions, I do not understand its decision on either point to be based on the State Constitution, independent of the Federal, nor does there appear to be reason, the language of the two Constitutions being virtually identical in both respects, for interpreting them differently under the circumstances of this case.

2. The rule suggested is limited to time of arrest because the silence sought to be used in this case was at that time. No opinion is expressed concerning similar use of postarrest silence, but cf. Judge STEVENS dissenting in *Doyle v Ohio* (426 US 610, 632-633).

an accusation or inquiry at the time of arrest or the failure then to mention an alibi,[3] but with defendant's failure to call the arresting officer's attention to the fact that he was not the *perpetrator* but rather the *victim* of crime, followed by defendant's testimony at trial, in direct contradiction of prosecution witnesses, that that was, indeed, the fact. To refuse to permit the jury to consider defendant's silence at arrest under those circumstances is to fly in the face of human experience and of the public interest in truthful testimony embodied in the impeachment rule. It is, to put it bluntly, to provide defendants with a license to lie, not required by Constitution, statute or precedent.

I

The majority's due process analysis overextends the scope of the holding in *Doyle v Ohio* (426 US 610) and misapprehends the facts of the instant case. What *Doyle* held to be a due process violation was "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings" (426 US, at p 619). It explained the essence of the unfairness on which its due process reasoning was bottomed in a footnote (426 US, at p 619, n 10) as follows: "After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that

3. Accusation or inquiry may be differentiated from the situation of the instant case because it so much more readily lends itself to police abuse (see McCormick, Evidence [2d Cleary ed], §§ 161, 270). Alibi requires recall which may require more time and thought than is available at the time and under the circumstances of arrest.

right." But as Mr. Justice STEVENS, dissenting, observed (426 US, at pp 625-626): "if no warning had been given * * * nothing in the Court's opinion suggests that there would be any unfairness in using petitioners' prior inconsistent silence for impeachment purposes."

That there is no unfairness when no *Miranda* warning has been given results from the absence of misleading conduct on the part of the State; there simply is no "state action" upon which to predicate a due process claim. The novel suggestion by the majority that the constitutional provision against self incrimination is a promise by the State not to use one's silence against him (p 179) will not withstand analysis. The provisions speak of compulsion to be a witness against oneself and as history shows are addressed to the compulsion and coercion of the Star Chamber (see *Michigan v Tucker,* 417 US 433, 440; *People v Thomas,* 46 NY2d 100, 107). That means that, as *People v Rutigliano* (261 NY 103) teaches, silence cannot be used as evidence in chief; it does not mean that silence cannot be used to impeach when defendant becomes a witness on behalf of himself (*People v Rothschild,* 35 NY2d 355, *supra*), any more than a defendant who pleads insanity may refuse to answer questions put to him by court-appointed psychiatrists during a mental examination (*Matter of Lee v County Ct. of Erie County,* 27 NY2d 432). In short, the suggested implied promise unduly expands the constitutional provisions and ignores the part that waiver plays in the determination of their meaning (see, also, *infra,* pp 188, 189).

Nor can a substitute "state action" basis be found, as the majority opinion tries to do, either in the anomaly of

rewarding improper failure to warn by permitting it to justify admission of the evidence or in the accused's possible "accurate appreciation and exercise of his basic constitutional rights" (p 180). As to the first, it assumes that any failure to warn is an improper police practice[4] and that that failure is the sole justification for admission of the evidence. But what we deal with in the instant case is a claim at trial which, if true, would have been made at or before arrest, spontaneously upon the appearance of the police, and as to which, therefore, the custody which triggers the *Miranda* warning obligation simply had not begun (cf. *Bradley v Jago,* 594 F2d 1100, 1103). There was, in any event, no improper practice in the present case because though defendant was taken into custody the police made no attempt to question him and he, therefore, never became entitled to *Miranda* warnings from them.

To speak of the failure to warn as justifying admission of evidence of silence misconceives the rationale of the impeachment rule and the purpose of cross-examination, moreover. The justification for admission of such evidence is the truth-seeking function of the trial and the relationship between credibility of trial testimony and defendant's prior inconsistent conduct in remaining silent under circum-

4. It is highly improbable that an officer will deliberately omit warnings in the hope that the person he arrests will remain silent so that his silence can later be used to impeach his trial testimony. Improper police practices when engaged in are intended to produce not silence but statements. But even were that not so, as the Supreme Court stated in *Harris v New York* (401 US 222), affirming our decision in 25 NY2d 175, "the benefits of this process [impeachment] should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby * * * sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief" (401 US, at p 225).

stances in which he would have, were his trial testimony true, felt compelled to say so at the time of his arrest (see *Doyle v Ohio,* 426 US 610, *supra; People v Wise,* 46 NY2d 321). Human experience teaches that an important factor in evaluating a present exculpatory statement is its consistency with any prior statement on the one hand, and the failure, on the other, to make a prior consistent statement at a time when the motivation to do so was strong. The failure to warn does not "justify" admission of the evidence, therefore. It simply removes the obstacle, in the nature of estoppel, that blocks use of the evidence: the unfairness of telling defendant he may remain silent and then using the fact that he did so to his detriment.

Permitting impeachment by silence involves no anomaly, therefore. But there is a very real anomaly involved in the majority's due process argument that it is common knowledge "absorbed from our common culture" that an arrested person is not required to speak to the police, for the predicate of *Miranda* is that it cannot be presumed that a defendant knows his rights upon arrest and that he must, therefore, have spelled out for him the precise guarantees the Constitution affords him.

Absent a showing that by giving *Miranda* warnings or by other representation to the person arrested the police have misled him into remaining silent, there is no basis upon which any due process violation can be found. There has been no such showing in this case.

II

No more does the privilege against self incrimination support reversal of Conyers' conviction. What the majority has done in reaching its conclusion is to apply the exception as though it were the rule.

The rule as the Supreme Court has made clear in many different ways is that a defendant who testifies in his own defense subjects himself to the same obligation to speak the truth and the same searching cross-examination to determine whether he has as does any any other witness. The exception is that the State may not cross-examine in areas in which by its own affirmative action or representation it can be said to have coerced or misled the defendant, or which are so tenuously probative as not to justify the resulting prejudice to defendant.

The underpinnings of the rule were well stated by Mr. Justice FRANKFURTER in *Brown v United States* (356 US 148, 154-156):

"If [a defendant in a criminal case] takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. '[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' *Fitzpatrick v. United States,* 178 U.S. 304, 315; and see *Reagan v. United States,* 157 U.S. 301, 304-305. The reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf.

* * *

"[W]hen a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a human safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell."

On similar reasoning the Supreme Court has upheld the use for purposes of attacking the credibility of defendant's trial testimony of a statement inadmissible on the prosecution's case in chief because of the lack of *Miranda* warnings (*Harris v New York,* 401 US 222, affg 25 NY2d 175, *supra*) or because obtained in contravention of defendant's right to counsel (*Michigan v Tucker,* 417 US 433, *supra; Oregon v Haas,* 420 US 714). We, likewise, have held that "[o]nce a particular statement is found appropriate for impeachment purposes, any *Miranda* infirmity becomes irrelevant" (*People* v. *Wise,* 46 NY2d 321, 329, *supra*).

Out of these cases has developed the concept that a defendant who takes the stand waives his privilege against self incrimination not only as it protects against prior official action, short of coercion or affirmatively misleading conduct, in improperly obtaining statements from him,

but also as he has previously affirmatively taken refuge in its protection. Thus, testimony given before a Grand Jury under a grant of immunity is compelled and cannot constitutionally be used to impeach (*New Jersey v Portash,* 440 US 450) and because silence after *Miranda* warnings has probably been induced by the giving of the warnings, it cannot constitutionally be used to impeach (*Doyle v Ohio,* 426 US 610, *supra;* cf. *Johnson v United States,* 318 US 189), but defendant's failure at his first trial to take the stand to deny testimony as to an incriminating admission can be used on cross-examination at his second trial, where he did take the stand, to impeach his testimony denying the same admission (*Raffel v United States,* 271 US 494).

Raffel assumed a significant inconsistency between defendant's testimony at the second trial and his silence at the first which later decisions of the Supreme Court in the exercise of its supervisory function relating to Federal trials have called into question (see *United States v Hale,* 422 US 171, 175; *Stewart v United States,* 366 US 1, 6; *Grunewald v United States,* 353 US 391, 420), but that does not diminish the force of its holding that when a defendant in a criminal case takes the stand he waives his privilege against self incrimination and like any other witness may be impeached by his prior silence,[5] provided only that there *is* a significant inconsistency between his trial testimony and his prior silence. Nor can it be said that when there is a

5. Compare *Grunewald v United States,* 353 US 391, 420. Note that despite a dissent by Mr. Justice BLACK, joined by the Chief Justice and Justices DOUGLAS and BRENNAN, urging that *Raffel* should be overruled, the court in *Grunewald* failed to do so, holding simply that *Raffel* was not controlling because there was no true inconsistency.

sufficiently significant inconsistency between prior silence and trial testimony the fact that its use burdens the exercise by defendant of a constitutional right proscribes doing so. The Supreme Court has recognized a number of times (as the majority apparently agrees) that not every burden upon the exercise of a constitutional right is impermissible (*Chaffin v Stynchcombe,* 412 US 17, 29; *McGautha* v. *California,* 402 US 183). Indeed, *McGautha* expressly held that "It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case" (402 US, at p 213) and that it is not impermissible to require that a defendant in determining whether to take the stand in his own behalf "take into account the matters which may be brought out on cross-examination" (402 US, at p 215).[6]

The balance to be struck is between defendant's decision whether to testify at trial and the strong policy against countenancing perjury. While there may be, as the majority suggests, possible prejudice to a defendant in the use of his pretrial silence in that the prosecutor, and ultimately the jury, may give it more emphasis than it deserves, de-

6. That part of what may be brought out on cross-examination is silence at the time of arrest does not compel the difference in result suggested by the majority in distinguishing *Harris v New York* from the instant situation (pp 182, 183). True *Harris* concerns deterrence from constitutional violation whereas we are concerned with defendant's silence in a situation in which silence is unnatural, which could be in the intentional exercise of a constitutional right, but the only compulsion involved in the latter is far from an impermissible one. All that is required is that defendant include in the considerations by which his decision to remain silent at arrest is arrived at the possibility that doing so may be used for impeachment when there is sufficiently great discrepancy between trial testimony and arrest silence to make the latter probative. In short, such burden as there is does not have the proportion attributed to it by the majority.

fendant of course has the right to offer any explanation he sees fit, to object if the summation distorts the situation and to request appropriate instructions for the guidance of the jury,[7] whereas the State's interest in truthful testimony as embodied in the impeachment rule is wholly defeated if the use of pretrial silence is proscribed.

The ultimate measure of admissibility, therefore, is the extent to which the pretrial silence can be said to be inconsistent with the testimony given at trial, or, to put it another way, the reliability or probative value of the pretrial silence. *Grunewald v United States* (353 US 391, *supra*), *Stewart v United States* (366 US 1, *supra*), *United States v Hale* (422 US 171, *supra*), and our own decision in *People v Wise* (46 NY2d 321, *supra*) suggest the bases for determination of this question. *Grunewald* held that there was no inconsistency between defendant Halperin's claim of privilege before the Grand Jury and his trial testimony because had he answered the questions put to him before the Grand Jury in the same way he subsequently answered them at trial, he nevertheless would have provided the Government with incriminating evidence; for example, since answering the Grand Jury question whether he knew Grunewald, one of the conspirators, would have tended to incriminate him by linking him to the conspiracy his claim of priv-

7. See, e.g., *Regina v Cripps* (3 Cr Rep NS 367, 371), in which the British Columbia Court of Appeal quoted approvingly the following passage from an earlier case: "it is wrong to say to a jury 'Because the accused exercised what is undoubtedly his right, the privilege of remaining silent, you may draw an inference of guilt'; it is quite a different matter to say 'This accused, as he was entitled to do, has not advanced at any earlier stage the explanation that has been offered to you today; you, the jury, may take that into account when you are assessing the weight that you think it right to attribute to the explanation'."

ilege was not inconsistent with his trial testimony that his acquaintance with Grunewald was free of any criminal element. The court noted also that Halperin repeatedly insisted before the Grand Jury that he was innocent and claimed privilege only because his attorney so advised, that Grand Jury proceedings are not adversary or protected by presence of counsel, and that Halperin was when called before the Grand Jury a potential defendant. *Stewart* found no inconsistency because the defendant, whose defense was insanity, testified only in gibberish, so the jury had nothing to evaluate but his demeanor. *Hale* found no inconsistency in defendant's silence after arrest with respect to his exculpatory trial explanation that the money found in his possession and about which he was questioned at the police station had come from his wife, because he had just been given *Miranda* warnings, knew he was a potential defendant because he had been the subject of an eyewitness identification, did assert his innocence and was in a "secretive" as distinct from an adversarial setting. Those facts plus Hale's prior contacts with the police and his participation in a narcotics rehabilitation program led the court to conclude that, on the facts of the case, there was no inconsistency since Hale "had no reason to think that any explanation he might make would hasten his release" and 'had substantial indication that nothing he said would influence the police decision to retain him in custody" (422 US, *supra,* at p 179). Our decision in *Wise* concerned defendant's denial at trial that he had, without *Miranda* warnings, made a prior inconsistent statement that linked him to the murder weapon, and is of value for purposes of the present discussion only for its definition of inconsistency

(46 NY2d, *supra,* at pp 327, 328): "Simply put, where a defendant's trial testimony offers one version of the events in question, and his prior remark to a police officer suggests a contrary view of these events, the jury is entitled to hear the previous statement so that it may fully assess the witness' credibility."

The majority states without analysis that defendant's silence when arrested was "essentially ambiguous" (p 181) and "too ambiguous" to "materially advance the search for truth" (p 183). Measured by the above criteria or on any other reasonable basis for evaluation that assessment is untenable, for there was simply no reason for defendant to acquiesce in his arrest without stating the version of the facts he testified to at trial if that version was the truth. When apprehended defendant, gun in hand, was being chased by one of the complaining witnesses, Dantzler. Ordered by the police, who had been alerted to the situation by a third party, to halt, defendant complied and dropped the weapon. On searching him, the officers found a black vinyl purse and some cash. Defendant was arrested and told at the time that he was being arrested for robbery, possession of a weapon, assault and attempted murder. Though he offered no such explanation when arrested, defendant testified at the trial that he had placed a numbers bet with Dantzler and when his number hit went to Dantzler's apartment to collect. Dantzler argued with him at first, but then told him, pointing to a pouch on a table, to go get the money. When he reached for the pouch, however, Dantzler drew a gun. Defendant knocked the gun from Dantzler's hand, picked it up and placed it and the pouch in his pocket, and then, to prevent Dantzler from following them the co-

defendant, Saunders, who had driven defendant to Dantzler's apartment, tied Dantzler up with rope. As defendant and Saunders were walking toward Saunders' car Dantzler emerged from the building screaming that he wanted his gun back. Some police officers appeared, Dantzler yelled at them that he had been robbed and defendant was arrested. Defendant denied ever having seen Grace Johnson until he was in custody.

The prosecution testimony which defendant sought to refute was that Dantzler and Grace Johnson were standing outside an apartment building talking when they were ordered by two young men, at gunpoint, to step inside, that once inside they were bound, money was removed from Dantzler's pockets and Grace Johnson's black bag containing money was taken, that Dantzler untied himself and as he emerged from the building saw defendant and Saunders turning the corner, was given a lift in that direction by a tow truck operator to whom he stated he had been robbed, but jumped off and proceeded on foot because the tow truck could not follow defendant and Saunders who were running against traffic, that Dantzler continued the chase on foot while the tow truck operator searched for police, that the tow truck operator was talking to police when he again spotted defendant gun in hand, that Johnson during all this time remained bound in the apartment building until released by a woman who entered the building.

It is not necessary to recount all of the many discrepancies in defendant's trial version, including the total failure to explain why Grace Johnson would have tied herself up or what motive she and the tow truck operator and the woman who untied Ms. Johnson would have had for framing de-

fendant. Such discrepancies are for the jury to consider in making the ultimate determination, and play a negative part in determining the permissibility of impeachment by silence in that the issue disappears if there are no such discrepancies, but are essentially hindsight. The inconsistency by which is determined whether silence has probative value to impeach is, however, to be measured at the time of the silence rather than at trial.

So measured, the obligation imposed by the human instinct for self-preservation to avoid arrest by explaining that the gun belonged to Dantzler and that defendant's running away from Dantzler, though Dantzler was unarmed, had an innocent explanation was at least as great as that imposed by his official duties upon the policeman involved in *People v Rothschild* (*supra*).[8] It is, moreover, an instinct which the law has recognized in other ways: in permitting testimony of the complaining witness in a rape trial that immediately after the crime she made complaint to a third person (*People v Deitsch*, 237 NY 300; Richardson, Evidence [10th ed—Prince], §§ 292, 519); in permitting testimony by a defendant who claims that his confession was coerced, that he complained of the mistreatment at the first suitable opportunity (*People v Alex*, 260 NY

8. The short answer to the majority's suggestion that silence in the instant case is essentially ambiguous is that we deal here not with one claiming simply innocence but with a person who claims to have been the *victim* of crime. The probability that such a person will withhold stating so to await a calmer moment, because he believed an explanation useless, or because he feels animosity toward the police is not so great that use of his silence to impeach him should be proscribed, though, of course, he may put such explanations before the jury for their use in evaluating his credibility. By taking the stand the defendant has waived his privilege against self incrimination to the extent necessary to evaluate his testimony.

425; Richardson, *op cit.*, § 519). The basis for the rule and the significance of the absence of complaint was well stated in *Alex* (260 NY, at pp 428-429): "When that issue [coercion of a confession] is involved, the question of whether a defendant made complaint of mistreatment at the first opportunity or within a reasonable time is material and relevant. It is of great assistance to the jury in determining whether a defendant's claim that a confession was induced by threats and fear is the truth or an afterthought, a concocted story to escape the effect of the confession. If complaint is not timely made, when it is made suspicion is aroused that it is a subterfuge."

While those cases deal with admission of evidence concerning the *making* of a statement as *corroborating* evidence whereas we are concerned with the *absence* of a statement as *impeaching* evidence, they are important to a determination of the proper rule relating to impeachment by silence because they proceed from a common human trait: it is natural to expect that one who has been outraged in person or property will make prompt disclosure or explanation, the more so when his or her failure to do so will result in his or her own arrest. Nor is the drawing of an adverse inference from the silence of a criminal defendant unknown to the law; for example, the inference of guilt from recent and unexplained possession of the fruits of crime (Penal Law, § 165.55; *People v Moro,* 23 NY2d 496). Clearly, therefore, defendant's silence at arrest can "materially advance the search for truth" and is, therefore, admissible, unless there were also present countervailing considerations of the *Grunewald-Stewart-Hale genre* to weaken its

probative value and require its exclusion in this particular case.

No countervailing considerations were present here. To state that Dantzler had pulled a gun on him and he had taken it away from Dantzler would not have incriminated defendant. He made no statement of innocence or guilt and at the moment of his arrest had not so far as he knew been identified by anyone as the perpetrator of a crime, nor had he received *Miranda* warnings. The most that can be said in favor of excluding the evidence of his silence, therefore, is that since he was carrying a gun he knew he was a potential defendant, that the "proceedings" were not adversarial (though they can hardly be deemed "secretive") and that (as the majority assumes) he was in fact aware of the Fifth Amendment. The first furnishes no basis for exclusion because the explanation of possession of the gun offered at trial would have obtained his release and Dantzler's incarceration. The second has little or no bearing on the natural instinct to explain in the situation in which defendant found himself at the time of arrest. As to the third, it is sufficient in the truth-seeking process of a trial to provide defendant with the opportunity to put before the jury the motivation for his silence.[9] To give it the exclusionary effect that the majority does, however, is to emasculate the rule.

In final analysis, the only advantage of the majority's rule, if it is a per se rule, is ease of application, but its

9. As Mr. Justice STEVENS, dissenting in *Doyle*, suggests (426 US, at p 626) exclusion is not warranted because the risk that a truthful defendant will be deceived by his understanding of the Fifth Amendment and also will be unable to explain his honest misunderstanding is so much less than the risk that exclusion of the evidence will merely provide a shield for perjury.

adoption on that basis alone would be procrustean. If on the other hand, the rule it adopts is intended to allow impeachment of a defendant by silence in "unusual circumstances", as appears to be the case, the failure to categorize the instant case as one such or to furnish guidelines concerning what may be so categorized can only result in confusion for the trial Bench and Bar.[10]

III

It is necessary to note additionally only that nothing in statute, or with two clearly distinguishable exceptions, in case law of our court requires the result the majority reaches. The only statute which touches the subject is CPL 60.15 (subd 2) which is, however, concerned only with the impermissibility of drawing any inference from defendant's failure to testify in his own behalf at trial.

Of the cases relied upon by the majority or in defendant's brief many are inapposite because they concern use of silence as part of the prosecution's direct case, a wholly different proposition from that here under discussion, or are general statements, broader than necessary for the case in which said and made without reference to a situation such as that of the instant case, so far as appears from the decision. In the first category fall *People v Rutigliano* (261 NY 103, *supra*); *People v Travato* (309 NY 382); *People v Bianculli* (9 NY2d 468); *People v Christman* (23 NY2d 429), which are also distinguishable on the grounds that

10. For example, the majority's direct burden rationale, discussed in footnote 6 above, would outlaw *Rothschild's* use of silence to impeach even though defendant in that case had a duty-imposed obligation to speak.

they involve failure to respond to accusations or to assert an alibi (see n 3 above) and that their reasoning relates to a failure to respond to statements made to them, rather than failure to speak spontaneously as the supposed situation would require (e.g., *People v Rutigliano,* 261 NY, *supra,* at p 107, "his silence should not be counted as giving assent to what he hears"). In the second, fall *People v Arce* (42 NY2d 179, 187) and *People v Thomas* (46 NY2d 100, 109, *supra*).

Of the four cases in which we have considered the use on cross-examination of prior silence as a means of impeachment two (*People v Rothschild,* 35 NY2d 355, *supra;* and *People v Fiore,* 34 NY2d 81) have permitted such use, and two (*People v Petersen,* 4 NY2d 992; and *People v Hyman,* 308 NY 794, affg without opn 284 App Div 347) have not. *Hyman* appears from the Appellate Division decision to have concerned cross-examination of defendant-doctors, who at trial testified that the alleged abortion was therapeutic, concerning whether they had refused while in custody to admit knowing the person upon whom the abortion had been performed, and we are told by the dissent in the Appellate Division (5 AD2d 698) that *Petersen* concerned cross-examination of a defendant charged with driving while intoxicated, who testified at trial that someone other than he had been driving the car, whether he had made any such assertion on the occasion of his arrest and while in custody. *Petersen* is closer to the spontaneous impulse that would have operated in the instant case had Conyers' trial testimony been true than is *Hyman,* but both are distinguishable because as indicated by the authorities upon which they relied (cases such as *Rutigliano,* excluding use

as direct evidence of prior silence) they gave no apparent consideration to the distinction between use on direct and use for impeachment purposes on cross.

Fiore and *Rothschild* on the other hand, allowed impeachment of defendant. *Fiore* may be distinguished from the instant case because it was defendant, seeking on redirect examination to bolster the exculpatory version testified to by him, who testified that he had not been asked before indictment to make any statement, whereas he had been called before the Grand Jury but was not permitted to testify because he refused to waive immunity. We held that it was permissible to impeach defendant by showing the latter fact even though it could not have been revealed as evidence in chief. The value of *Fiore* to the present discussion is limited to its distinction between evidence in chief and impeachment and its conclusion that not every burden upon the right to remain silent is impermissible.

Rothschild is more closely in point for it permitted cross-examination of a police officer defendant, who had testified on direct that he had received money only to set the giver up for a bribery charge, to show that he had not revealed the scheme to his superiors, or to his fellow officers at the time of arrest. In so holding we relied (35 NY2d, *supra,* at p 360) upon the patent inconsistency between silence and the defense asserted and defendant's patent obligation to speak and noted with interest similar holdings in *United States ex rel. Burt v State of New Jersey* (475 F2d 234) and *Agnellino v State of New Jersey* (493 F2d 714).

It would unduly extend this already too long opinion to discuss in detail *Burt* and *Agnellino,* and in any event, our

noting of those cases "with interest" is not the same as noting them with approval. Nonetheless, it is worthwhile pointing out that though neither involved the "patent obligation to speak" to which we referred in *Rothschild,* each found the inconsistency involved to be as "highly probative" as did we the inconsistency in *Rothschild* (35 NY2d, *supra,* at p 360). In sum, the obligation to speak imposed by duty in *Rothschild* was no more compelling than that imposed by Conyers' own self-interest were his trial testimony true and, therefore, furnishes no basis for distinguishing *Rothschild* from the instant case. Just as in *Rothschild* defendant's testimony was "diametrically inconsistent with that produced by the prosecution", and his silence upon arrest was "patently inconsistent with the defense asserted" (35 NY2d, *supra,* at p 360), so in the present case is Conyers. Having distinguished between direct and impeachment use of silence in that case to reach a sound and proper result, we now effectively reverse that result.

For the foregoing reasons, I would reverse the order of the Appellate Division insofar as it is appealed from, and would remit to the Appellate Division for further proceedings.

Chief Judge COOKE and Judges WACHTLER and FUCHSBERG concur with Judge GABRIELLI; Judge MEYER dissents and votes to reverse in a separate opinion in which Judges JASEN and JONES concur.

Order affirmed.

APPENDIX B

Remittitur of the Court of Appeals

Remittitur amended by order of the Court dated,

March 20, 1980

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 450

THE PEOPLE &c.,

Appellant,

vs

THOMAS CONYERS,

Respondent.

The appellant in the above entitled appeal appeared by Robert M. Morgenthau, District Attorney, New York County; *the respondent appeared by* William E. Hellerstein and Philip Weinstein, The Legal Aid Society.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Gabrielli, J. All concur except Meyer, J., who dissents and votes to reverse in an opinion in which Jasen and Jones, JJ., concur. Upon the appeal herein there was presented and necessarily passed

Court of Appeals Remittitur

upon a question under the Constitution of the United States, viz.: Whether cross-examination of a criminal defendant, for impeachment purposes, concerning his silence at the time of arrest, is violative of defendant's federal constitutional rights. The Court of Appeals considered this question and concluded that such questioning does violate defendant's federal constitutional rights.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa, Clerk of the Court
Court of Appeals, Clerk's Office, Albany, January 8, 1980.
April 21, 1980 *nunc pro tunc* March 20, 1980

JOSEPH W. BELLACOSA

APPENDIX C

Order and Opinion of the New York Supreme Court, Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 21, 1978

Present—Hon. Theodore R. Kupferman, Justice Presiding
Harold Birns
Arnold L. Fein
Myles J. Lane
Leonard H. Sandler, Justices

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

THOMAS CONYERS,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Scott, J.), rendered on April 26, 1976, convicting defendant, after a jury trial, of robbery in the

first degree, robbery in the second degree, attempted assault in the first degree, possession of a dangerous weapon in the second degree, and possession of a dangerous weapon in the third degree, and said appeal having been argued by Mr. Randolph Volkell of counsel for the appellant, and by Meredith Anne Feinman of counsel for the respondent; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, the sixth count of the indictment charging defendant with attempted felony assault dismissed as jurisdictionally defective, and the matter remanded for a new trial.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appellate Division Opinion

FEIN, J.

Defendant Conyers appeals from a judgment convicting him following a jury trial on two counts of robbery in the first degree, two counts of robbery in the second degree, attempted assault in the first degree, possession of a dangerous weapon in the second degree and possession of a dangerous weapon in the third degree. The issue here is the propriety of the cross-examination by the prosecutor as to defendant's silence at the time of his arrest. Did such cross-examination infringe upon defendant's constitutional right to remain silent?

The evidence on behalf of the prosecution was that on August 28, 1975, defendant and codefendant Saunders accosted Marion Dantzler and Grace Johnson in the street at gunpoint and directed them to enter a hallway at 328 East 126th Street in Manhattan. Defendants allegedly took money from Dantzler and a purse containing cash from Johnson. After tying up the victims, defendants fled. Dantzler, however, untied himself and ran from the building in pursuit of Conyers and Saunders. A tow truck operator, Frank Moreau, aided in the chase. It appears that Saunders fired a shot at Dantzler during the chase, although Moreau testified he thought that Conyers had fired the shot. Police officers who subsequently joined in the chase apprehended both Conyers and Saunders. A search of Conyers yielded the gun and Johnson's purse containing $92.70. Saunders was found in possession of $89.04 and a piece of white rope similar to that which had been used to tie up Dantzler. Defendants were taken to the precinct where Johnson and Dantzler identified them. Dantzler told the police that

$250 to $300 had been taken. Johnson claimed about $200 had been removed from her purse.

The defense version of the events differed. Conyers testified that he had placed a bet with Dantzler the day before the alleged robbery. After ascertaining that he had won, he went to Dantzler's "numbers spot" on the third floor of 320 East 126th Street to collect. An argument ensued when Dantzler denied taking the bet. After about five minutes, Dantzler pointed to money on a table and told Conyers to go get it. Conyers saw a black pouch on the table. As he reached for it Dantzler drew a gun. Conyers testified that he knocked the gun out of Dantzler's hand and that the gun discharged as it hit the floor. Conyers picked up the gun and the pouch while Saunders took some rope and tied Dantzler's hands. Defendants left the apartment heading for Saunders' car. When they observed Dantzler chasing them, screaming that he wanted his gun back, Conyers and Saunders ran, pursued by Dantzler, until police officers apprehended them at 124th Street.

On cross-examination, the prosecutor inquired over objection as to whether Conyers had told the police that the gun was not his, that it was Dantzler who had drawn the gun and Conyers had taken it from Dantzler in self-defense:

"Q. Did you, at any time, tell the police that the gun was not yours, that in fact Mr. Dantzler had drawn the gun on you and that you had taken the gun away from him more or less in self defense? * * *

"A. I didn't say anything to the police officers.

"Q. Did you, at any time, tell the police that the money and the pouch, the money in the pouch was yours and that it was owed to you as a debt?

"A. No."

Conyers contends that the cross-examination concerning his silence when arrested was improper since it infringed upon his constitutional right to remain silent, his privilege against self incrimination. He asserts that the court committed reversible error when it permitted, over Conyers' objection, inquiry by the prosecutor as to Conyers' silence when he was arrested. The District Attorney contends that the inquiry was not directed against Conyers' exercise of his right to remain silent. The prosecutor's purpose was not to interfere with defendant's right to remain silent, but rather to demonstrate that defendant's story was a recent fabrication. The inquiry sought only to ascertain whether Conyers told the police that (1) the gun was not his; (2) he had taken it away from Dantzler in self-defense after the latter had drawn the gun on him; (3) the money in the pouch was owed to him in payment of a debt.

In her summation, alluding to the defense testimony, the prosecutor relied on Conyers' failure to speak at the time of his arrest to demonstrate that his story was a recent fabrication. The inquiry and summation plainly raised before the jury and called to its attention the fact that Conyers had remained silent at the time of his arrest and had not offered to the police the exculpatory account of the events as related by him upon the trial.

Such cross-examination and summation improperly impinged upon Conyers' right to remain silent. He had no

obligation to speak. Under the circumstances of this case, it constitutes prejudicial error.

A defendant's silence at the time of his arrest may not be used against him in subsequent judicial proceedings (*People v Rutigliano,* 261 NY 103). Such silence at the time of arrest may not be used to impeach a defendant upon the trial (*Doyle v Ohio,* 426 US 610). To hold otherwise would penalize a defendant for the exercise of his constitutional privilege to remain silent while under custodial interrogation. In *People v Arce* (42 NY2d 179) counsel for codefendant Arce inquired of Camara as to whether Camara, at the time of his arrest, told the police about the shootings. After an objection to the question was overruled, Camara answered in the negative. However, subsequently, when the Assistant District Attorney posed a similar question to Camara, the Trial Judge sustained the objection and instructed the jury to the effect that when a person is under arrest he is not legally obligated to say anything to the police or to anyone else and that no unfavorable inference may be drawn against a defendant by reason of his silence. The Court of Appeals ruled that the question propounded by the prosecutor was "improper" even though unanswered, since it brought "to the attention of the jury" the fact that defendant Camara had been silent at the time of his arrest. However, although the court found error in even asking the question, it was ruled to be nonprejudicial by reason of the clear and direct curative instructions to the jury which were given by the trial court. (*People v Arce,* 42 NY2d 179, 187, *supra.*)

Here, however, the trial court overruled the objection, in effect directing defendant to respond as to his failure to

relate to the police his exculpatory account of the events. Defendant's testimony was in direct conflict with that of the victim, Dantzler. The credibility of defendant and Dantzler, therefore, was a prime issue. Under the circumstances, in a case where resolution of the issue may well have depended upon the jury's evaluation of defendant's credibility as opposed to that of the chief prosecution witness, the inquiry relating to Conyers' postarrest silence may have had such a significant prejudicial effect as to deprive him of his right to a fair trial. To cross-examine a defendant as to his postarrest silence and to comment upon such silence in summation penalizes a defendant for exercising his Fifth Amendment privilege to remain silent when he is under police custodial interrogation (*Miranda v Arizona,* 384 US 436, 468). It is an error of constitutional dimensions, violative of the due process clause of the Fourteenth Amendment. (See *Doyle v Ohio,* 426 US 610, 619, *supra.*) Under the circumstances of this case, the error is not harmless beyond a reasonable doubt. (*Chapman v California,* 386 US 18; *People v Crimmins,* 36 NY2d 230.)

As stated by the Second Department in *People v Smoot* (59 AD2d 898, 899): "Although not every violation of a defendant's constitutional rights at trial constitutes reversible error (see *Chapman v California,* 386 US 18, 24), we hold that in this case, where the evidence against defendant cannot be characterized as overwhelming, where a review of the testimony of the principal witnesses against him reveals certain inconsistencies and contradictions, and where so much depended upon the jury's evaluation of the credibility of the two main prosecution witnesses on the one

hand, and of the defendant and his two alibi witnesses on the other, that there was substantial prejudice to the rights of the defendant so as to deprive him of a fair trial. The law is clear that the prosecution may not comment upon the postarrest silence of a defendant and that a defendant has no obligation, when in custody, to tell either the police or the District Attorney that he has an alibi or other exculpatory defense. To cross-examine the defendant about his postarrest and pretrial silence concerning his alibi defense and to comment upon such silence in summation is fundamentally unfair and a denial of the right to due process (see *Doyle v Ohio,* 426 US 610; *United States v Hale,* 422 US 171; *People v Christman,* 23 NY2d 429, 433; *People v Rutigliano,* 261 NY 103;*People v Gambino,* 52 AD2d 957, 958; *People v Felcone,* 43 AD2d 976, 977)."

Similarly here, although our case does not involve an alibi defense, cross-examination and summation by the prosecution highlighted for the jury the silence of defendant at the time of his arrest and his failure to offer to the police the exculpatory statement testified to at trial, despite the well-settled law that a defendant in custody has no obligation to speak. This is not a case where a defendant because of his office or job may have a duty to speak. (See *People v Rothschild,* 35 NY2d 355.)

The cross-examination extracted from defendant the fact that he said and did nothing. The summation used defendant's silence and inaction to ground an attack upon his credibility and to buttress Dantzler's credibility in his contrary account of the events. Since defendant was plainly under no duty to talk at all, the cross-examination and

summation by the prosecutor as to defendant's silence at the time of his arrest was improper and constituted a denial of defendant's right to a fair trial. The error was compounded by the inquiry and comments concerning defendant's refusal to sign the police property clerk's voucher for the money and pouch taken from him by the police at the time of his arrest.

Upon this record there must be a new trial. Upon remand the sixth count for attempted felony assault must be dismissed as jurisdictionally defective. Like attempted felony murder, there is no such crime as attempted felony assault. (Penal Law, § 120.10, subd 4; see *People v Hassin,* 48 AD2d 705; *People v Hendrix,* 56 AD2d 580.)

We note that the points relied on here were not raised in *People v Saunders* (63 AD2d 868, mot for lv to app den 44 NY2d 956).

Accordingly, the judgment, Supreme Court, New York County (Scott, J.), rendered April 26, 1976, convicting defendant Conyers should be reversed, on the law, the sixth count of the indictment charging defendant with attempted felony assault dismissed as jurisdictionally defective, and the matter remanded for a new trial.

Kupferman, J. P., Birns, Lane and Sandler, JJ., concur.

Judgment, Supreme Court, New York County, rendered on April 26, 1976, unanimously reversed, on the law, the sixth count of the indictment charging defendant with attempted felony assault dismissed as jurisdictionally defective, and the matter remanded for a new trial.

APPENDIX D

Excerpted Portions of Trial Transcript

CONYERS—DEFT—CROSS

* * *

(477) Q. The point in time Mr. Dantzler started screaming, he screamed, I believe you said, "He robbed me," or something to that effect? A. Yes.

Q. Was the police car still stationary? A. Yes; he was.

Q. It was after you heard him say something that the police car started to back up? A. I wasn't watching. I wasn't aware of it.

Q. But you were not running toward the police car. A. No.

Q. So, he yelled and there came a time after you heard him yell that the police car started moving and came toward to. It was backing up; is that correct? A. Yes.

* * *

(479) Q. Did you, at any time, tell the police that it was Mr. Dantzler who had the gun on you and that you were—

Mr. McClary: Objection, Judge.

Q. Did you ever tell the police that it was Mr. Dantzler who had originally taken, drawn (480) the gun on you and that you had in fact taken the gun away from him in self defense?

Mr. McClary: Objection, Judge.

The Court: What is the basis?

Mr. McClary: The basis of the objection is that the defendant is advised of his right not to talk to the police. And there is no foundation here as to whether the police asked him what happened.

The Court: Overruled.

Mr. Zuckerman: May we be heard before the bench, if Your Honor please?

The Court: Yes.

(Bench conference, off the record, out of hearing of the jury.)

The Court: Overruled.

Mr. Zuckerman: Exception.

The Court: You may have an exception.

Q. Mr. Conyers, do you recall the question? A. No.

Miss Mages: Would you repeat the question?

Q. Did you, at any time, tell the police (481) that the gun was not yours, that in fact Mr. Dantzler had drawn the gun on you and that you had taken the gun away from him more or less in self defense?

Mr. McClary: Objection, for the record.

Mr. Zuckerman: Objection for the record.

The Court: Overruled. You may have an exception.

Mr. McClary: Thank you. I take exception.

The Court: You may answer.

A. I didn't say anything to the police officers.

Q. Did you, at any time, tell the police that the money and the pouch, the money in the pouch was yours and that it was owed to you as a debt? A. No.

Mr. McClary: I make the same objection.

Mr. Zuckerman: Objection.

The Court: Overruled. You may have an exception.

Mr. Zuckerman: Exception.

Q. Did you, at any time, attempt to press criminal charges against Mr. Dantzler (482) for his drawing a weapon up you.

Mr. Zuckerman: Objection Judge.

The Court: Overruled. You have an exception.

A. I didn't do anything.

SUMMATION—PEOPLE

(786) And finally, the defendants would have you believe that they were the persons who had been wronged, that a gun was drawn on them, that Thomas Conyer was being denied an honest debt that was owed to him. Let's examine this more carefully. They did not tell this to the Police. I suggest to you that it was a recent fabrication, something that they made up to attempt to explain away the damaging evidence. And what is the damaging evidence? The rope from the pocket of defendant Saunders, the black purse containing (787) money from the pocket of the defendant Conyer, and the gun in the hand of defendant Conyer.

And let's examine their actions when they saw the Police. They saw the Police coming from their right, and what did they do? They made no attempt to hail down the police car. In fact, both defendants, on that stand, admitted that on seeing the police car they ran in an opposite direction, and I suggest to you that those are not the actions of persons who had been wronged. Those actions are clearly consciousness of guilt.

* * *

Trial Transcript

(800) Mr. Zuckerman: May I also note, for the record purposes, my objection to the District Attorney telling the jury that they were under obligation or should have said they were innocent when confronted by Marion on the street or in the police station. I respectfully submit that the defendant is under no obligation to say anything and merely being there, being accused, that his silence is not to be deemed an admission or an implication of any kind as to his guilt.

The Court: You have your objection, if you made an objection, and I overruled it. You have your exception.

* * *

Supreme Court, U. S.
FILED
AUG 1 1980
MICHAEL RODAK, JR., CLERK

No. 79-1751

IN THE

Supreme Court of the United States

October Term, 1979

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

THOMAS CONYERS,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

PETITIONER'S SUPPLEMENTAL BRIEF

ROBERT M. MORGENTHAU
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ROBERT M. PITLER
MEREDITH ANNE FEINMAN
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Of Counsel

TABLE OF AUTHORITIES

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Cases:

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1751

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

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THOMAS CONYERS,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

PETITIONER'S SUPPLEMENTAL BRIEF

In a supplemental brief in opposition to the petition for certiorari, respondent contends again that the decision below rested on an independent state ground. Of course, this contention is directly contradicted by the amended remittitur in this case. In a desperate attempt to avoid review, by seeking to persuade this Court to disregard the unequivocal meaning of the amended remittitur, respondent now argues that the concurring and dissenting opinions in *People* v. *Savage,* —— N.Y.2d ——, No. 300 (July 3, 1980) show the decision in this case to rest on an independent state ground.

In *Savage* (a 5-2 decision), in an opinion by Judge Fuchsberg, the New York Court of Appeals held that if a defendant waives his right to remain silent and tells one story when he is arrested, and subsequently testifies to another story at trial, then he may be cross-examined regarding his failure to tell that same story at the time of his arrest. Notably, the majority opinion does not mention the instant case but instead relies extensively on *Jenkins* v. *Anderson,* 100 S.Ct. 2124 (June 10, 1980).

Perceiving the significance of *Jenkins,* both the concurring opinion by Chief Judge Cooke, and the dissenting opinion of Judge Gabrielli, joined by Judge Wachtler, state that the *Conyers* case rested on both the State and Federal Constitutions. These three judges along with Judge Fuchsberg, comprised the majority in *Conyers.* Respondent argues that it can be assumed that Judge Fuchsberg concurred in the view that *Conyers* was decided on state and federal grounds because he did not contest that interpretation when he authored the majority opinion in *Savage.* Respondent therefore reasons that the decision in *Conyers* rested on an independent state ground notwithstanding the amended remittitur.

Respondent's argument is unsound. That Judge Fuchsberg's majority opinion in *Savage* was silent on this issue does not lead rationally to the inference that he agreed with Judges Cooke, Gabrielli and Wachtler regarding their interpretation of the *Conyers* decision. This is so because it was unnecessary for the majority in *Savage* to discuss *Conyers.* Inasmuch as *Savage* concerned a defendant who made a statement when he was arrested, whereas *Conyers* concerned a defendant who did not speak, the majority in

Savage was evidently of the view that the holding in *Conyers* was inapplicable. Hence, there was no need to respond to the dissenting and concurring judges' discussion of *Conyers*. Furthermore, it is fundamental that a majority opinion should not be interpreted in light of the rhetorical comments of the minority, which frequently overstate the majority view. Put simply, there was no reason for Judge Fuchsberg to respond to Judges Cooke, Gabrielli and Wachtler when he authored *Savage*.

Neither can the clear meaning of the amended remittitur be defeated by the argument that three of the four judges who joined the majority in *Conyers* have expressed subsequently their view that *Conyers* rested on an independent state ground. It is the practice of the New York Court of Appeals for the entire court, not just the members of the majority, to vote on motions to amend a remittitur. Thus, even assuming that when they voted on the remittitur motion in *Conyers*, Chief Judge Cooke and Judges Gabrielli and Wachtler had the same belief expressed in their opinions in *Savage*, it becomes clear that Judge Fuchsberg was part of the majority which voted to amend the remittitur in *Conyers*.*

Respondent's newest jurisdictional argument to avoid a determination on the merits is understandable in view of this Court's recent holding in *Jenkins* v. *Anderson*, 100 S.Ct.

* That members of the minority vote on motions to amend the remittitur is jurisprudentially sound. Were it otherwise, a minority of the state court could deprive this Court of jurisdiction based upon its view that a case had been decided on State and Federal Constitutional grounds, even though a majority of the court believed not only that the case was decided on Federal Constitutional grounds, but also that its decision had no independent state basis.

2124 *supra,* that the Federal Constitution is not violated by impeaching a defendant with his pre-arrest failure to exculpate himself where he was not given *Miranda* warnings and did not otherwise specifically indicate that he was relying on his right to remain silent. True, *Jenkins* concerned the silence of a defendant who was not in custody. However, as noted by even the dissenters in *Savage,* the language in *Jenkins* would seem to apply with equal force to the silence of a defendant who, like Conyers, was in custody. (*People* v. *Savage,* No. 300, dissenting slip op. at 3, fn. 1). Thus, to avoid any further review and the inevitable application of *Jenkins* to this case, respondent has taken an unsupportable position which is directly contradicted by the amended remittitur.

The decisions in *Jenkins* and *Savage* might suggest that this case should be remanded to the New York Court of Appeals rather than reviewed by this Court. However, as noted in our petition, this case presents the last of three recurring factual situations concerning an accused's silence and subsequent cross-examination about that silence. (*See* Petition p. 10). Consequently, the case should be heard on the merits.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

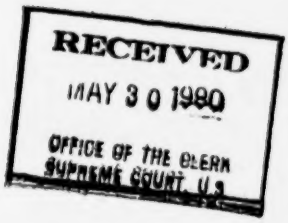
ROBERT M. PITLER
MEREDITH ANNE FEINMAN
Assistant District Attorneys
Of Counsel

July, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979



No. 79-1751

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

THOMAS CONYERS,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 53(1) of the Rules of this Court, motion is hereby made that the respondent be allowed to proceed in forma Pauperis before this Court. Respondent's affidavit in support of this application is annexed hereto.

Dated: New York, New York
May 28, 1980

Respectfully submitted,

Philip L. Weinstein

PHILIP L. WEINSTEIN
WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420
Attorneys for Respondent

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

THOMAS CONYERS, being duly sworn, deposes and says:

I am respondent herein and make this affidavit in support of my application to proceed in forma pauperis in connection with the filing of the brief in opposition to the petition for a writ of certiorari.

I am presently free on bail pending a final determination of this case.

I am without funds to pay the cost of printing my brief in opposition and retaining counsel.

In the New York State Appellate Courts, I was allowed to proceed in forma pauperis and was represented by counsel associated with the Legal Aid Society of the City of New York. Such counsel have agreed to continue to represent me in this Court without expense to me.

WHEREFORE, it is respectfully requested that the application for leave to proceed in forma pauperis be granted.

Thomas Conyers
THOMAS CONYERS

Sworn to before me this
6th day of May, 1980

Nathan Rosenblum

NATHAN ROSENBLUM
Notary Public, State of New York
No. 24-8654120
Qualified in Kings County
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1751

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

-against-

THOMAS CONYERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions below are set forth in the Petition and are contained in petitioner's Appendix.

JURISDICTION

Respondent contests the jurisdiction of this Court for the reasons set forth in this brief.

QUESTION PRESENTED

Whether this Court should review the decision of the New York Court of Appeals, that cross-examination of a criminal defendant for impeachment purposes, concerning his post-arrest silence, in the absence of Miranda warnings, violates due process, because the decision below is based on independent and adequate state grounds, does not present a significant constitutional question and is in accord with established federal constitutional principles.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions are set forth in the Petition.

STATEMENT OF THE CASE

The Prosecution's Case

On August 28, 1975 at about 1:30 p.m. MARION DANTZLER, a livery cab driver, was talking to GRACE JOHNSON, his friend of two and a half years, outside of 328 East 126th Street in Manhattan. They had been talking for about a half-hour when two young men approached and ordered them at gunpoint to "step inside." After both Dantzler and Johnson had been bound with rope, the men, subsequently identified as respondent and Saunders, removed the money from Dantzler's pockets and took Johnson's black drawstring bag containing money and a key. Initially Dantzler reported that between $300 and $350 had been taken from him, but at trial he reduced his claimed loss to $150. Johnson testified that "close to $200" had been taken from her. Upon obtaining their money, the men departed.

It took Dantzler three to four minutes to untie himself. As he emerged from the building, he saw respondent and Saunders, who were looking back at him, turn the corner of 126th Street. Dantzler started to chase them on foot, but when he saw FRANK MOREAU in his tow truck, Dantzler persuaded Moreau to follow the two men. Driving in reverse, Moreau drove to 125th Street and Second Avenue, where he stopped at a red light. Dantzler jumped off the truck and resumed his chase by foot. Suddenly, one of the men stopped and fired at Dantzler. According to Moreau, it was respondent. According to Dantzler, Saunders fired the shot and then, as they continued to run, gave the gun to respondent.

Since the men were running against the traffic, Moreau was unable to follow them and drove in search of a police officer. Officers NICHOLAS GARCIA and ERNEST JACOBOWITZ stopped Moreau when he drove through a red light. As Moreau was explaining the reason for his haste, he spotted respondent, gun in hand, on Third Avenue and 124th Street. The officers drove towards respondent, stopped alongside him, exited from their patrol car and ordered him to halt. When respondent complied and dropped the weapon, he was arrested, immediately handcuffed and driven to the precinct. Jacobowitz estimated that one minute elapsed from the time they first observed respondent until they arrested him. An additional minute and a half elapsed from the time of the arrest until they entered the precinct.

Although the police report indicated that $500 was taken from Dantzler and Johnson, only $181 was recovered from respondent and Saunders. A purse was also recovered from respondent and a piece of rope was found on Saunders.

During the chase, Johnson remained bound in the building. Eventually, a woman she knew as "Cookie" came into the building and cut the rope. Johnson did not, however, mention Cookie's involvement to the police and first mentioned her name to the prosecutor during a February, 1976 interview. At trial CHINA JONES testified that she was known as Cookie and had untied Johnson.

The Case for the Defense

On August 27th RESPONDENT, who was twenty-five at the time of the trial, placed a fifty cent bet on the number fourteen with Marion Dantzler. Upon being informed that the number had "hit," respondent asked his friend Arthur Saunders to drive him to Dantzler's "numbers spot" on the third floor of 320 East 126th Street. When they entered Dantzler's apartment, Dantzler denied that he owed respondent any money. Following a brief argument, Dantzler relented. Pointing to a pouch on the table, Dantzler said, "Okay, go get the money." Respon-

dent testified that he was entitled to $300.

When he reached for the pouch, however, Dantzler drew a gun. Respondent wheeled around and knocked the gun from Dantzler's hand. The gun discharged when it hit the floor. Respondent picked up the gun and placed it and the pouch in his pocket. To prevent Dantzler from following them, Saunders tied his hands with some rope found on the floor.

Respondent and Saunders were walking towards Saunders's car, but they started to run when Dantzler emerged from the building screaming that he wanted his gun back. Some police officers appeared and Dantzler yelled to them that he had been robbed. Respondent was arrested and told, at that time, that he was being arrested for robbery, possession of a weapon, assault and attempted murder. There is no indication in the trial record when, if ever, Miranda warnings were given to respondent.

The extensive cross-examination by the prosecutor of respondent concerning his post-arrest silence, as well as her comments in summation, are set forth by Petitioner in the Appendix. Pet. App. pp. 43a-46a.

ARTHUR SAUNDERS'S testimony concerning this incident was substantially the same as respondent's. As she had done with respondent, the prosecutor extensively cross-examined Saunders about his post-arrest silence.

The case was submitted to the jury at 3:18 p.m. and deliberations continued until 11:00 p.m., when the jury was sent to a hotel for the night. A verdict finally was reached the next afternoon at 1:00 p.m.

OPINION BELOW

The New York Court of Appeals held that cross-examination of respondent, for impeachment purposes, concerning his silence at the time of arrest is violative of the due process clauses of the State and Federal Constitutions. That holding was based

on alternative and independent due process theories.

The first rationale relied on Doyle v. Ohio, 426 U.S. 610 (1976). Unlike Doyle, however, there was no evidence that the police had given respondent any Miranda warnings. Nonetheless, "for purposes of due process analysis based on the unfairness of capitalizing upon the accused's accurate appreciation and exercise of his basic constitutional rights," the court deemed it to be irrelevant "whether that knowledge was imparted by the police, as is required by law, or was absorbed from our common culture." In either situation, the use of an accused's post-arrest silence for impeachment purposes violates due process. The alternative rational for the decision was that "Because of the low probative value which may reasonably be attached to silence, the State's interest in utilizing that evidence for impeachment purposes is correspondingly weakened and will not justify the imposition of even so attenuated a penalty on the exercise of a defendant's right to remain silent."

The court amended its remittitur to reflect that there was "necessarily passed upon a question under the Constitution of the United States." The remittitur did not indicate, however, whether both of the alternative rationales were controlled by the Federal Constitution.

Reasons For Denying The Writ

I.

This court has long "adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 125 (1945). If the state court rests its decision "on both state and federal grounds, either of which would have been dispositive," review by this Court is barred. Zacchini v. Scripp-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). Here, the decision below was based on adequate and independent

state grounds and the petition should be denied for that reason.

Despite references in the opinion below to the state constitution [49 N.Y.2d at 179-80, Pet. App. p. 5a & 6a], petitioner asserts that the due process holding was predicated solely upon Doyle v. Ohio, 426 U.S. 610 (1976). That argument is based upon the court's amendment of its remittitur to state "that there was presented and necessarily passed upon a question under the Constitution of the United States." Pet. p. 9, f.n. Petitioner characterizes the alternative holding of the court as grounded upon a substantial and novel expansion of the Fifth Amendment privilege against self-incrimination. Pet. p. 11. The defect in petitioner's argument is that it is premised on a misinterpretation of the court's opinion. The opinion is grounded on alternative due process theories, only one of which turns on Doyle v. Ohio, supra. The second rationale relied upon by the court is based on due process considerations predicated on adequate and independent state law. Such a reading of the court's opinion is supported by an examination of the authorities relied upon and is corroborated by subsequent opinion of the Court of Appeals in People v. Dawson, ____N.Y.2d____ (5/16/80). This interpretation is also consistent with the amendment of the remittitur.

The alternative rationale of the court below, which required a balancing of probative value against due process considerations, is based on an analysis absent from Doyle v. Ohio, supra. There, this Court declined to express an opinion on the probative value for impeachment purposes of an accused's post-arrest silence. 426 U.S. 617-8, f.n. 8. Nor did this Court express any view on due process considerations other than those flowing from giving a suspect Miranda warnings. Thus, the alternative due process rationale was not reached on constraint of Doyle v. Ohio, supra. Moreover, it was not

based on principles of federal constitutional law. Rather, the court relied on well established independent principles of state law.

The initial premise in the court's alternative due process rationale was that any attempt to penalize a person for the exercise of the right to remain silent in the face of interrogation must be scrutinized with extreme care. 49 N.Y. 2d at 180, Pet. App. pp. 6a-7a. That principle is firmly rooted in state law and it was "for this reason that in New York it has long been the law that evidence of silence at the time of arrest may not be used as part of the prosecution's direct case." 49 N.Y.2d at 180, Pet. App. p. 7a. The decision in which that principle was established, People v. Rutigliano, 261 N.Y. 103 (1933), long preceded Griffin v. California, 380 U.S. 609 (1965), which the court below interpreted as establishing a similar and parallel principle on constitutional grounds.* Nonetheless, the court acknowledged that neither decision resolved the question before it, although the considerations underlying both were applicable. Applying these parallel and independently derived considerations, the court concluded that using post-arrest silence for purposes of impeachment constituted at the very least, an attenuated penalty on the exercise of a defendant's right to remain silent.** 49 N.Y.2d 182; Pet. App. p. 9a.

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* Petitioner's contention that the court's penalty analysis was supported by exclusive reliance on Griffin v. California, 380 U.S. 609 (1965) [Pet. p. 12] ignores this extensive discussion of People v. Rutigliano, 261 N.Y. 103 (1933).

** Contrary to petitioner's allegations [Pet. p. 9], the court did not abandon People v. Rothschild, 35 N.Y.2d 355 (1974) [holding probative a police officer's silence in the face of accusations where officer was under a duty to inform his superiors of his undercover activities]. The court specifically referred to that decision as an example of circumstances in which the probative value of post-arrest silence might outweigh the due process considerations. 49 N.Y.2d at 181, Pet. App. p. 8a.

To be balanced against this due process consideration was the probative value of such silence. In finding that post-arrest silence was of low probative value the court relied on its own reasoning and an examination of the facts in this case. Special emphasis was placed upon the fact that since appellant was arrested gun in hand any explanation he gave was likely to prove futile. In addition, the court observed that many people in "our society" react to police with suspicion and distrust. 49 N.Y.2d at 182, Pet. App. p. 9a. Apart from the court's own reasoning process, the only authorities referred to by the court were "see" citations to United States v. Hale, 422 U.S. 171 (1975), and a law review comment. Clearly, then, the court's conclusion that the silence was of low probative value was based on its own examinations of the evidence, rather than on federal constitutional principles.

Although the alternative holding refers to both the state and federal right against self-incrimination, the decision is based on due process considerations. Any ambiguity with respect to that question was resolved in People v. Dawson, _____N.Y.2d____ (5/16/80) (Slip op. p. 12), where the court, in an opinion by Judge Gabrielli, who also authored the majority opinion in this case, described the court's holding as follows:

> In Conyers, we held that a defendant's silence at or after the time of his arrest may not be used to impeach his testimony at trial. Although we relied upon modern principles of due process in reaching that conclusion, we stressed as an alternative rationale (id., at p. 181, n. 2), that a defendant's silence in the presence of his accusers is of such low probative value that its usefulness as impeachment evidence must be deemed to be outweighed by the due process considerations which militate against its use [emphasis added].

Petitioner incorrectly assumes that by amending the remittitur the Court of Appeals acknowledged that Doyle, and therefore the United States Constitution, was the predicate for its due process holding. Pet. p. 9, f.n. Such a

conclusion would be justified if the court's decision was based on a single rationale. It is not warranted where, as in this case, the decision is based on alternative grounds, only one of which implicates the United States Constitution. Under such circumstances the court must pass upon the federal constitution, even though the alternative holding is entirely based on state law. Therefore, it was appropriate for the court to amend its remittitur to indicate that a federal constitutional question was passed upon. Such an amendment is consistent, however, with the existence of an alternative holding which is not predicated on the federal constitution. Thus, the amended remittitur in this case does not support petitioner's interpretation of the opinion below.

In sum, when the court "scrutinized with extreme care" the use of post-arrest silence for impeachment purposes and held that because of its low probative value it should not be used for that purpose, it was applying well established and independent due process principles of state law, adequate to require a reversal of respondent's conviction apart from any violations of federal constitutional rights. This Court is barred from reviewing such a decision and therefore, the Petition should be denied.

II.

Relying on Doyle v. Ohio, 426 U.S. 610 (1976) and Jenkins v. Anderson, ____U.S.____ (argued 1/8/80), petitioner argues that review should be granted in this case because it presents the "last of the three recurring factual situations" involving the use for impeachment of an accused's pretrial silence. Pet. p. 10. Unlike the impeachment of a defendant by his post-arrest silence following Miranda warnings or pre-custody silence, the use of a defendant's post-arrest silence prior to Miranda warnings has not generated numerous opinions in the lower appellate courts. From the absence of such opinions and differing views, it can be concluded, contrary to petitioner's characterization, that the issue presented by this case does not present

a recurring factual situation needing resolution by this Court.

Before this Court accepted for review the issue presented by Doyle v. Ohio, supra, many lower appellate courts had expressed views, often differing, on the use of post-arrest silence. E.g. United States v. Hale, 422 U.S. 171, 173 f.n. 2 (1975) [listing conflicting opinions of the United States Courts of Appeals]; Compare State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973), with People v. Queen, 8 Ill.App.3d 858, 290 N.E.2d 631 (1972). Similarly, a body of lower appellate court law on the use of a defendant's pre-arrest silence for impeachment had developed before Jenkins v. Anderson, supra, was accepted for review. E.g. Bradley v. Jago, 594 F.2d 1100, 1103 (6th Cir. 1979); Compare Robeson v. State, 39 Md.App. 365, 386 A.2d 795 (1978), with People v. Sheperd, 37 Col.App. 336, 551 P.2d 210 (1976).

In contrast to the issues presented in both Doyle and Jenkins, the issue presented by this case has not resulted in numerous and conflicting opinions by lower appellate courts. Neither the court below nor petitioner, either before the New York Court of Appeals or in this Court, referred to any such decisions. To our knowledge four other courts have written on the subject and all agree with the New York Court of Appeals that post-arrest silence, even absent Miranda warnings, is too ambiguous to be used as a basis for impeachment. United States v. Nunez-Rios, ____F.2d____(2d Cir. Slip op. May 22, 1980) [cross-examination and comment by prosecutor for purposes of impeachment on silence of a defendant after arrest but before receiving Miranda warnings improper, but harmless error]. Bradford v. Stone, 594 F.2d 1294 (9th Cir. 1979) [violation of Doyle, even absent Miranda warnings, where defendant questioned on post-arrest failure to say anything about his alibi defense to police, but found to be harmless beyond a reasonable doubt]; United States ex rel. Allen v. Rowe, 591 F.2d 391 (7th Cir. 1979);

[cross-examination of defendant on his post-arrest silence, prior to Miranda warnings, to impeach justification defense violated Fifth Amendment right to remain silent]; Leon v. Kuhlmann, 443 F.Supp. 50, 56 (E.D.N.Y. 1977) [holding silence which occurred after arrest but before Miranda warnings to be insolubly ambiguous and, therefore, an improper area for the prosecutor to have explored, but harmless error in that case].

Unlike the Doyle and Jenkins situations, the issue presented by this case has generated few opinions and no divisions of views. From this fact, it can be concluded that the issue is not of great moment, nor a situation of common concern to criminal prosecutions throughout the United States. Since petitioner has failed to demonstrate that this case presents a significant constitutional question, review should be denied.

III.

The sole distinction between this case and Doyle v. Ohio, 426 U.S. 610 (1976), and the source of the split in the courts below, was the failure of the arresting officer to give respondent Miranda warnings at the time of his arrest. In holding that omission to be irrelevant,* the court below relied on the observation that "it is a matter of common knowledge that a person who is arrested is not required to speak to the police, and that his silence may not be used against him." 49 N.Y.2d at 180, Pet. App. p. 6a. If the "common knowledge" thesis is accurate, the court below correctly applied the dictates of Doyle v. Ohio, supra to the facts found.

The assumption that the right to remain silent upon arrest is a matter of common knowledge is grounded on numerous decisions of other appellate courts, as well as empirical data. Thus

* Identical conclusions have been reached by the other courts that have considered the relevance of this distinction. United States v. Nunez-Rios, ___F.2d___ (2d Cir. Slip. op. May 22, 1980. Bradford v. Stone, 594 F.2d (9th Cir. 1979); United States ex rel. Allen v. Rowe, 591 F.2d 391 (7th Cir. 1979); Leon v. Kuhlmann, 443 F.Supp. 50, 56 (E.D.N.Y. 1977).

in Kelley v. United States, 236 F.2d 746, 749 (D.C. Cir. 1956), the court quoted from State v. Hester, 137 S.C. 145, 185, 134 S.E. 885, 898-9:

> ...members of the bar have cautioned their clients not to discuss their cases with those with whom they came in contact, unless absolutely assured of their friendships, and many good lawyers have advised clients to refrain from talking at all. This has been the practice so long that it has become a well-known fact to our people generally.

See McCarthy v. United States, 25 F.2d 298, 299 (6th Cir. 1928) [common knowledge that after arrest a person in custody has a right to say nothing]; Michigan v. Tucker, 417 U.S. 433, 439 (1974)(Rehnquist, J.) [Today, "virtually every schoolboy is familiar with the concept"].

Both Kelley and McCarthy were decided prior to this Court's decision in Miranda. Given the wide discussion of Miranda in the media and the many television programs and movies depicting police officers warning suspects of their right to remain silent, it is even more likely that citizens are aware of these rights at the present time. And it is especially likely that respondent was aware of these rights since he had been arrested and prosecuted twice after this Court decided Miranda and before his arrest in this case.

The "common knowledge" theory is also supported by the testimony of defendants as reported in several recent New York cases. For example, in People v. Norris, ____A.D.2d____, New York Law Journal, May 2, 1980, p. 13, col. 6,(2d Dept.), after the police read the Miranda rights to the accused, he responded, "I know my rights better than you. I just got out of jail." And in People v. Adams, 73 A.D.2d 525, 422 N.Y.S.2d 406 (1st Dept. 1979), the defendant gave a similar explanation for his failure to say anything to the police:

> ...I did not answer no questions, I told him until I have an attorney. I know this by me being there before. I know my little rights. I can protect myself....

Assuming Doyle is aimed at the unfairness of "trapping" an arrestee encouraged to remain silent by the implicit guarantee contained in Miranda, it is no less unfair to trap an arrestee

relying on "common knowledge" of those same rights. Having found that the right to remain silent is a matter of common knowledge, the court below correctly applied established constitutional principles to that conclusion.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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May, 1980

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SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

Since the filing of our brief in opposition, the New York Court of Appeals has rendered an opinion in which three members of the majority in this case referred to their opinion as being based on an interpretation of the State Constitution independent of the Federal Constitution. That opinion further supports our argument that this Court is barred from reviewing the decision below by the doctrine of adequate and independent state grounds. Moreover, it refutes Petitioner's argument that "by amending the remittitur, the New York Court of Appeals was expressly stating that the reversal was mandated by the Federal Constitution and the reversal did not rest on any independent state ground." Petitioner's Reply, p. 2.

In People v. Savage, ____ N.Y.2d ____ [slip op., July 3, 1980],* the New York Court of Appeals held that a defendant who has been given Miranda warnings and has waived his right to

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* Annexed hereto as an Appendix.

silence by giving a narrative of his criminal involvement may be cross-examined at trial on his failure to inform the police at that time of the exculpatory circumstances to which he later testifies. Writing for the court, Judge Fuchsberg, who was a member of the majority in this case, concluded that Savage presented a situation fundamentally different from that presented in Doyle v. Ohio, 426 U.S. 610 (1976), because Savage did not remain silent after being given his Miranda warnings. Hence, he made no reference to this case.

In his dissent in Savage Judge Gabrielli, who authored the court's opinion in this case, joined by Judge Wachtler, who also had been a member of the majority in this case, argued that the impeachment should not have been permitted. The following reference is made to the court's opinion in this case:

> We also held in Conyers that use of silence, even for impeachment purposes only, was improper under both the Federal and State Constitutions regardless of whether the defendant has actually been given his Miranda warnings. Recently, the Supreme Court in Jenkins v. Anderson (48 USLW 4693), has indicated that if the defendant is not given Miranda warnings and does not otherwise specifically indicate that he is relying upon his right to remain silent, the use of that silence for impeachment purposes is not violative of the Federal Constitution. This holding, however, does not vitiate the conclusion we reached in Conyers that such cross-examination is violative of our State Constitution. In any event, since Savage was given Miranda warnings, Jenkins is not relevant to this appeal.

Id. slip op. p. 3, f.n. 1. Chief Judge Cooke, also a member of the majority in this case, similarly characterized the court's opinion in this case in his concurring opinion in Savage. Id. Cooke, Ch. J. (concurring).

In sum, three of the four judges comprising the majority in this case clearly expressed the view in Savage that the court's opinion in this case, in which the state constitution was explicitly relied upon, was based on independent state grounds. Since the fourth member of the majority in this case

authored the Court's opinion in Savage and did not contest that interpretation, it can be assumed that he agreed. Thus, the Amendment of the remittitur simply reflects the alternative grounds for the decision below or the court's interpretation of similar, but independent provisions of the State and Federal Constitutions. Under these circumstances the Petition should be denied. At the very least, the case should be remanded to determine whether the view expressed by three members of the court below that their decision in this case was based on independent state grounds represents the view of the court. See California v. Krivda, 409 U.S. 33 (1972).

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED OR THE CASE REMANDED FOR CLARIFICATION.

Respectfully submitted,

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WILLIAM E. HELLERSTEIN
Attorneys for Petitioner

July 15, 1980

State of New York
Court of Appeals

1 No. 300
The People &c.,
Respondent,
v.
James Savage,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(300)Bennett M.Lincoff & William E. Hellerstein, NY Legal Aid, for appellant.
Mario Merola,DA,Bronx County(Laurence J. Lebowitz & Billie Mannin of counsel) for respondent.

FUCHSBERG, J.:

The question on this appeal is whether a defendant who, having been given the warnings required by Miranda v Arizona (384 US 436) and having elected to waive his right to silence, proceeds to narrate the essential facts of his involvement in the crime, may be cross-examined about his failure to inform the police at that time of exculpatory circumstances to which he later testifies at trial. We hold that, under the circumstances here, neither due process nor the privilege against self-incrimination prohibits this manner of impeachment.

Defendant James Savage appeals from an order of the Appellate Division which affirmed a judgment entered upon a jury verdict convicting him of first degree assault. The conviction flowed from his

shooting of one Robert Johnson in the course of an altercation outside the Central Bar on East 161st Street in the Bronx. At the trial several witnesses for the People, including Johnson, testified that Savage had drawn his gun and purposely shot Johnson. One of the prosecution's witnesses, the arresting officer, testified that several weeks after the crime had been committed, when he apprehended the defendant, immediately after the administration of the Miranda warnings, the defendant volunteered, first,"I'm glad I'm caught -- I'm tired" and then went on to describe his role in the shooting, confessing that he had shot Johnson with a gun he possessed during an altercation outside the bar. Significantly, to the prosecutor's additional inquiry, made without objection,as to whether the defendant had "indicate[d] anything further to you apart from what you've just stated", the officer's response was "no".

Thereafter, during his own case, the defendant, choosing to take the stand, testified that he indeed had shot Johnson and then added by way of justification that the shooting had occurred during an altercation precipitated when Johnson attempted to rob him. He also told the jury that the actual discharge of the gun was inadvertent. On cross-examination the prosecutor, in an obvious attempt to establish that the exculpatory material was a recent fabrication, essayed and, over objection, was permitted to put a short series of questions at the heart of which was the one that reads: "Now, when you saw Detective Creegan [following the arrest], before you saw your lawyer, when you saw the police officer, did you tell the police officer that [Johnson] attempted to rob you?" The defendant's response was that he had done so. As might be expected, during the course of his summation, the District Attorney, in arguing that the detective's version of the post-Miranda statement was more credible, made the point that, if it was, the fact that the defendant had omitted any mention of the exculpatory circumstance at the time of his original statement militated against its truth.

In our view, the prosecutor's queries to the defendant were proper and, therefore, so were the comments made in closing argument.

It is by now well-settled that the use of his post-arrest silence against a defendant even for impeachment purposes may violate due process and the privilege against self-incrimination. In Doyle v. Ohio (426 US 610), fundamental fairness forebade a prosecutor to attempt to draw an adverse inference from the fact of a defendant's silence at the time of arrest because the defendant's receipt of the Miranda warnings had, in effect, conveyed the State's assurance that, if he elected to remain silent, his silence would not be used against him (id., at 617,619; see Jenkins v Anderson, __US __,48 USLW 4693, 4696 [June 10, 1980]). Having been told he need not speak about the facts of the case at that time, the State cannot renege on its promise and use the silence to impeach him when he subsequently testifies at trial. Moreover, viewed against the obvious prejudice, the use of a defendant's silence at a time when he was privileged to say nothing at all was recognized to be of dubious probative value because it cannot be determined whether, in fact, it was the existence of the privilege that induced the silence. (Doyle v. Ohio, supra, at 617,618; see People v. Rutigliano, 261 NY 103,107.)

However, as the Supreme Court has even more recently made clear, a defendant, who, in the face of Miranda warnings, decides not to exercise his privilege but instead chooses to speak to the police about the charges against him, enjoys no due process protection from such an inquiry (see Jenkins v. Anderson, supra, p 4696; Anderson v Charles, __US__, 48 USLW 3819 [June 16, 1980]). Rather, whether he may be impeached by the use of telling omissions from the tale he told is to be determined under State evidentiary law (Jenkins v. Anderson, supra, p 4696; cf. People v. Dawson, __NY2d __slip op at 13-14 [dec'd May 6, 1980]).

Against this backdrop, the case before us emerges as fundamentally different from Doyle (supra). For, the simple and undeniable fact is that the defendant here did not remain silent. In stark contrast to the circumstances in Doyle, where the defendants "did not speak about the facts

of the case at the time" when the silence there occurred (426 US at 619, as reiterated in Jenkins v. Anderson, supra, p 4694), the most cursory examination of the record reveals that Savage, for all practical purposes, did just the opposite.

As already indicated, the direct testimony of the arresting officer established that Savage, without any overbearing of his will, responded to the opportunity to inform the officer of his involvement in the crime. Moreover, this he did in no conclusory form. A breakdown of his statement proves that he specifically stated that he possessed a pistol, that he used the weapon to shoot Robert Johnson, that the shooting occurred in the course of a dispute between him and Johnson, that the shooting took place in front of a bar and that the bar was located on 161st Street. Not only were these relevations incriminatory, they expressly incorporated essential elements of the crime with which he was to be charged. But excluded from all this was the crucial exculpatory circumstance to which the defendant later was to testify -- that he had shot his victim unintentionally while warding off the latter's attempt to rob him.

Given defendant's voluntarily rendered narrative of his part in the shooting, this omission speaks more eloquently than words. For, what was omitted is far from an inconsequential detail or a collateral matter, but a fact of such overwhelming significance that its absence from the narrative was at least as calculated to distort his recitation as a most affirmative falsehood. It put an entirely different cast on the event.

It is an elementary rule of evidence, and of common sense, in our State and almost every other jurisdiction, that, when given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for purposes of impeachment (3A Wigmore, Evidence [McNaughton rev ed], §1042; Richardson on Evidence [Prince-10th ed], §222). This rule is firmly imbedded in behavioral

expectations (cf. People v. Dawson, supra).

Therefore, that the defendant decided not to offer the mitigating explanation for his conduct in amelioration of his role in the shooting he undertook to describe could challenge credulity. Having on his own ventured to communicate devastatingly incriminating information, his failure to then so much as mention the excuse he was later to put forth is well-nigh inexplicable except as a recent fabrication. Measured by the way in which almost any normal person would perceive it, the strongest considerations of self-interest would be expected to keep him from containing it within himself. In short, his conduct ran counter to human experience. And further confirmation of its significance comes from the setting in which the omission occurred: that moment of psychological truth when a defendant chooses to inculpate himself, "that moment [when] he will tell all, and tell it truly" (3 Wigmore, Evidence [Chadbourn rev ed], §851, p 524).[1] Thus, the exclusion, however it might be weighed by the triers of the facts, was, to say the least, extraordinarily probative in enabling them to evaluate the reliability of the explanation when it surfaced for the first time at trial.

Moreover, reference to the omission, because of its negative nature, could not serve substantively as evidence in chief to prove the commission of the crime. It did not lend itself to employment, whether by way of evidence or argument, as anything more than a device for impeachment (compare United States v Agee, 597 F2d 350,354,357, cert denied __US __, with id., at 365-368 [dissenting opinion]).[2]

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1. The weighty experiential support for this principle, Professor Wigmore has noted, has been recognized by masters of psychology as varied as Honore Balzac and Daniel Webster (3 Wigmore, Evidence [Chadbourn rev ed] §851, p 524, n 2).

2. It is also worth mention that the prosecutor's question in any event could have had no more than cumulative effect; the juxtaposition of the inclusion of the exculpatory matter in the defendant's own testimony, on the one hand, and its absence from the officer's recounting of his post-arrest conversation with the defendant, on the other, could hardly have been lost on the jury. Moreover, defense counsel's failure to object to the pertinent questions put to the officer as to the completeness of the post-Miranda statement only emphasizes that the contrast between the policeman's version and that the defendant was to give was bound to introduce a full-blown impeachment issue even if the defendant had not been cross-examined at all.

Such an analysis fully grants the respect to be accorded a defendant's constitutional rights, whether in the exercise of his privilege against self-incrimination or to the process that is his due. But, doing so, it also recognizes that the intent behind the privilege against self-incrimination, exemplified by the supportive Miranda procedures it has spawned, is not to induce silence but only to insure that the choice to speak is free and uncompelled (see ALI, Model Code of Pre-Arraignment Procedure, pp 168-174). That it was so in the case before us now is unchallenged. There is not the slightest suggestion that government action, passive or active and whether via the Miranda warnings or otherwise, induced the omission. If anything, it can be said that the warnings provided him with a ready means by which to rationalize the omission at trial (see Doyle v. Ohio at 626 [Stevens, J., dissenting]).

In striking the balance these principles bespeak, the State is denied the right to draw adverse inferences from the fact that a defendant has maintained an effective silence, even if something less than total. However, as we have seen, constitutional standards do not inhibit every use of a defendant's post-arrest silence, but only those which are fundamentally unfair (Doyle v. Ohio, supra, at 618,619-620 & n 11; United States v. Conlin, 551 F2d 534, cert denied 434 US 831 [to rebut defendant's claim that he told exculpatory version to police after his arrest]; cf. Jenkins v. Anderson, __US __, 48 USLW 4693, 4696,and 4698 n 1 [Marshall, J.,dissenting] [use of prearrest silence to impeach defendant's credibility]; Roberts v. United States, __US __, 48 USLW 4370, 4371-4372 and 4372-4373 [Brennan, J., concurring] [refusal of defendant to answer questions about co-conspirators held to permit increased sentence]; United States v. Trujillo, 578 F2d 285,287-288 [post-arrest silence may be pertinent to claim of insanity]).

Thus,as Doyle teaches,courts may not overlook the obvious fact that post-arrest silence will often be "insolubly ambiguous" since it may be impossible to determine whether the defendant was motivated to remain silent in the

exercise of his Fifth Amendment privilege or, for example, because he then possessed no acceptable explanation for the conduct for which he was in custody. But, in a case like the one before us today, where we deal with a defendant who did not stand mute, even-handed logic dictates that time-tested evidentiary procedures for the ascertainment of truth not be ignored (Anderson v. Charles, __US__, 48 USLW 3819).[3]

Surely, that is true as to a defendant who, instead of invoking his right to silence, "chooses to speak in the unfettered exercise of his own will" (Miranda v Arizona, 384 US 436,460) and, in so doing, speaks pertinently to the criminal accusation against him. When, as in the present case, the defendant, though alerted to his rights by the officer, is ready enough to make an almost cathartic confessional of both his relief at being apprehended and the role he played in the shooting itself, he manifests an unmistakable "decision to cast aside his cloak of silence" and thus should not now be permitted to forestall impeachment of his credibility with the cavalier claim that he did not so intend (Jenkins v. Anderson, supra, at 4695).

That this case does not fit into the analytical mold of Doyle is also apparent from the fact that the dissenters must indulge in the utterly unwarranted presumption that the defendant, whom the Miranda warnings did not deter from revealing his leading part in the criminal transaction, suddenly thought the better of it and refused to say anything more in reliance on the privilege which until that instant he had completely ignored. Putting aside the fact that nothing in the record supports this tenuous assumption, such an approach must proceed on the peculiar premise that the defendant would unnaturally have halted his speech solely to withhold the one thing he normally would want to put up front, his exculpatory explanation.

3. It goes without saying that, in such circumstances, the trial court, exercising its authority to supervise the cross-examination (see People v. Ocasio, 47 NY2d 55,60), may be expected to apply standards like those we enunciated in People v. Dawson (__NY2d __, dec'd May 6, 1980), adjusted of course, for the differences between a witness in the position of the one in that case and of a defendant in a case like the present one. Thus, for example, the court should, if requested, advise the jury that the defendant was under no legal obligation to have continued speaking, and should permit the defendant the opportunity to tender explanation for his omissions.

This being so, it is noteworthy that other courts, interpreting Doyle in like circumstances, also have sanctioned the impeachment of a defendant's credibility by confronting him with logically significant omissions from a post-arrest statement (see,e.g., United States v. Agee, 597 F2d 350, 354-357 [3rd Cir]; United States v Mireles, 570 F2d 1287, 1291-1293 [5th Cir]; Twyman v Oklahoma, 560 F2d 422, 424 [10th Cir], cert. denied 434 US 1071; United States v. Mitchell, 558 F2d 1332, 1334, 1335 [8th Cir]).

Most important, misapplication of the protective principles these cases endorse in the long run would but serve to undermine rather than advance the values protected by the privilege against self-incrimination and due process. For nothing saps the strength of a legal precept more than when, as put into practice, it turns out to have an unanticipated, unrealistic and undesirable effect.

For all these reasons, the order of the Appellate Division must be affirmed.

People v Savage

Case #300

COOKE, Ch. J. (concurring):

I concur in the result in this case. I write, however, because I believe that the majority's studied silence on the matter overrules our recent decision in People v Conyers (49 NY2d 174). There, relying on both the Federal and State Constitutions, we held that defendant's post-arrest silence could not be used against him, even in the absence of Miranda warnings. This rule was founded on the State's implied promise not to use against a defendant the constitutionally guaranteed right to remain silent and on the rationale that it would be fundamentally unfair to permit the State to renege on that promise by later using that silence against him (People v Conyers, supra, at 179-180). Both due process and the privilege against self-incrimination (NY Const, art 1, §6) prevented use of defendant's post-arrest silence for impeachment purposes. Moreover, we recognized the weak probative value of post-arrest silence given its inherent ambiguity (id. at 181-182). In contrast to Conyers, the instant case does not involve post-arrest silence. Defendant here freely chose to speak. Thus, Conyers is inapplicable. Since Jenkins v Anderson (___US___, 48 USLW 4693) does not compel a different approach to that adopted in Conyers, I cannot join the majority opinion in this respect.

People v Savage
Case #300

GABRIELLI, J. (dissenting):

Pursuant to well-established legal precedent, I am compelled to dissent and vote to reverse the order of the Appellate Division. Simply stated, the People were improperly permitted, over a timely objection, to question defendant about his failure to provide the police at the time of his arrest with every detail of the explanation for his conduct that he subsequently asserted at trial. Since there existed no actual inconsistency between what defendant told the police following his arrest and his testimony at trial, cross-examination concerning defendant's partial silence at the time of his arrest is violative of due process (People v Conyers, 49 NY2d 174; Doyle v Ohio, 426 US 610; cf People v Dawson, ___ NY2d ___, decided May 1, 1980).

In the early morning hours of January 4, 1977, defendant shot one Robert Johnson in the abdomen during an altercation with Johnson on the sidewalk outside the Central Bar at East 161st Street and Morris Avenue in the Bronx. Fortunately, the injury was not fatal. Savage was arrested for the crime several weeks later, and after being given the warnings mandated by Miranda v Arizona (384 US 436), defendant told police that he was glad he had been arrested, because he was "tired". He also admitted that he had shot Johnson outside the Central Bar, but he otherwise gave no details about the incident at that time, according to the trial testimony of the officer to whom those statements were made. At defendant's trial, Johnson and several other witnesses testified that defendant had drawn his gun and purposely shot Johnson during an argument. Defendant testified on his own behalf. He admitted shooting Johnson, but sought to justify his action, asserting that Johnson had assaulted him and was attempting to rob him. Defendant claimed that he drew the gun in the hope of frightening off Johnson and without any intention of actually using it, but that the gun accidentally discharged in the scuffle.

On cross-examination, the court permitted the prosecutor to ask defendant the following question over a timely defense objection: "Now, when you saw Detective Creegan [following the arrest], before you saw your lawyer, when you saw the police officer, did you tell the police officer that he [Johnson] attempted to rob you?" Since the officer had already testified on direct that defendant had simply admitted shooting Johnson and had not made any other statements following his arrest, this question was obviously intended to impeach defendant's exculpatory testimony at trial by suggesting that it was a recent fabrication. Interestingly, however, defendant responded that he had in fact told the officer his version of the incident. The prosecutor was then permitted to cross-examine defendant at some length about the discrepancy thus revealed between the testimony of the officer and that of defendant concerning the statements defendant had made to the officer. For reasons that follow I am constrained to conclude that it was error to allow the People to question defendant about his failure to tell the police his version of the facts following his arrest. Hence, there should be a reversal and a new trial.

It has long been the law in this State that a defendant's silence following his arrest may not be used against him as evidence of guilt (People v Rutigliano, 261 NY 103). Although at one time it was permissible to use the defendant's silence as a means of impeaching his in-court testimony on the ground that it was a recent fabrication (see People v Rothschild, 35 NY2d 355), that exception to the general prohibition against the use of a defendant's silence was sharply curtailed by the Supreme Court in Doyle v Ohio (426 US 610). It was held in Doyle that a defendant who remains silent after being given his Miranda warnings may not subsequently be questioned, even for the limited purpose of impeachment, concerning that silence. Thereafter, in People v Conyers

(49 NY2d 174, 180, supra) we recognized that under both the Federal and New York State Constitutions, "the use for impeachment purposes of an accused's silence at the time of his arrest is violative of due process".[1] I consider this principle, which a fortiori is applicable to the assertion of the right to silence following an arrest (see Doyle v Ohio, 426 US 610; see also People v Conrow, 200 NY 356, 367-369), to be dispositive of the instant appeal. Quite simply, the question quoted above constituted an attempt to use defendant's post-arrest silence to impeach his trial testimony by suggesting that his failure to tell the police his version of events following his arrest implied that it was a recent fabrication. As such, it falls within the bar against such cross-examination enunciated in Doyle and in Conyers.

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1. We also held in Conyers that use of silence, even for impeachment purposes only, was improper under both the Federal and State Constitutions regardless of whether the defendant has actually been given his Miranda warnings. Recently, the Supreme Court in Jenkins v Anderson (48 USLW 4693), has indicated that if the defendant is not given Miranda warnings and does not otherwise specifically indicate that he is relying upon his right to remain silent, the use of that silence for impeachment purposes is not violative of the Federal Constitution. This holding, however, does not vitiate the conclusion we reached in Conyers that such cross-examination is violative of our State Constitution. In any event, since Savage was given Miranda warnings, Jenkins is not relevant to this appeal.

The majority conclude that the instant case is distinguishable from Doyle and Conyers because the defendants in those cases said little or nothing to the police at the time of arrest, whereas Savage did admit that he had shot Johnson. I do not find this factual distinction to be constitutionally significant in this context. The majority impliedly suggest that a defendant who once waives his right to remain silent by speaking to the police must then either continue to speak or subject himself to cross-examination concerning his subsequent silence. I am unable to agree with that and cannot concur in the majority's decision to so neatly separate the initial assertion of the right to remain silent from any subsequent exercise of that right. A defendant who does begin to speak to the police has the absolute right to cease speaking at any time and thereby impliedly reassert his right to be silent, and no compulsion, however subtle, may be employed to persuade such a defendant to continue speaking. One who makes an admission to the police does not thereby assume any obligation to volunteer further information, and the failure to do so may not serve as a basis for discrediting a subsequent explanation. This is so because the decision to refrain from giving complete details to the police, like the decision not to speak to the police at all, must be deemed an assertion of the defendant's right to remain silent. Since the State has impliedly promised every defendant that it will not use his silence against him, it would be fundamentally unfair to nonetheless allow the assertion of that right to be used even for impeachment purposes only (see People v Conyers, supra).

Clearly distinguishable are those cases in which a defendant at or following his arrest actually makes a statement which is inconsistent with his later testimony at trial.[2] In such a situation, the prosecution is free to use that inconsistency for impeachment purposes, even if the statement would be inadmissible on the prosecution's direct case because it was obtained without first providing the suspect with the mandatory Miranda warnings (People v Wise, 46 NY2d 321; People v Harris, 25 NY2d 175, aff'd 401 US 222). There exist several reasons why a testifying defendant may be impeached by inconsistent statements obtained in violation of Miranda but not by his assertion of his right to refrain from speaking to his accusers. First, while the State promises a defendant that it will not use his silence against him and may not subsequently renege on that assurance, no similar promise is made with respect to a defendant's voluntary statements, even if obtained in violation of Miranda. Hence, there exists no fundamental unfairness in allowing the latter to be used for impeachment purposes. Moreover, a direct inconsistency is of much greater probative value than is a defendant's complete or partial silence. Furthermore, "a defendant's decision to

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2. The People also suggest that the instant case does present an actual inconsistency in that the defendant told the officer following his arrest that he had shot Johnson during a "dispute", whereas at trial defendant testified that he had shot Johnson during an attempted assault and robbery. I find this particular argument unpersuasive, for two reasons. First, there does not appear to be any necessary contradiction between the two accounts. That the"dispute" between defendant and Johnson was caused by a robbery attempt does not make it any less of a "dispute". Moreover, the police officer did not specifically testify that the defendant actually used the word "dispute" to describe the incident; rather, that term was supplied by the prosecutor (cf Anderson v Charles, ___ US ___, 48 USLW 3819).

remain silent at the time of arrest is in and of itself an assertion of a basic constitutional privilege. Thus, to allow that silence to be used against a defendant is to place a burden upon the direct exercise of a fundamental right. The Miranda warnings, on the other hand, constitute a prophylactic device designed to prevent constitutional violations and to protect the rights of an accused. In the absence of any actual coercion, a statement made by a defendant who has not been informed of his rights is not inherently suspect, nor does the use of such a statement against a defendant penalize that defendant for the exercise of a constitutionally protected right"(People v Conyers, supra, 49 NY2d at 182-183). In sum, whenever the alleged inconsistency arises not from the defendant's words, but from his failure to speak fully at a time when he was privileged to refrain from speaking at all, the prosecution may not use that claimed inconsistency to impeach the defendant's trial testimony.

This is not to suggest that a defendant may never be cross-examined as to his failure to speak. Certainly, if the defendant himself puts the matter in issue, the trial court would not abuse its discretion by allowing the People to pursue the subject. For example, if a defendant on direct examination, or even in response to a legitimate prosecution query during cross-examination, were to testify that he told his exculpatory version of the facts to the police, the prohibition against the use of defendant's silence would not apply. In such a case, the trial court would be empowered not only to allow cross-examination of the defendant on this point (see Doyle v Ohio, supra, 426 US at 619-620, n 11), but also to permit the People to provide direct evidence to the contrary in rebuttal (see also People v Wise, supra, 46 NY2d at 328). This is so because a defendant who is allowed, whether properly or not, to buttress his exculpatory trial testimony

in such a way (see Richardson, Evidence [10th ed], § 519) creates an issue concerning the exact extent of his statements to the police and thereby opens the door to an inquiry which would otherwise be forbidden. In short, if a defendant seeks to rely on a claim that he made certain statements to the authorities, the prosecution normally should be free both to attempt to disprove the existence of those statements and to explore the circumstances surrounding their purported utterance.

No such exception to the general bar against use of a defendant's silence is applicable to the instant case, for here the entire issue arose as a result of an improper prosecution attempt to use defendant's post-arrest silence to discredit his exculpatory trial testimony. It is true that defendant did eventually testify that he had told the officers his exculpatory story. Hence, in accord with the principle discussed above, had such a statement been made either on direct or in response to permissible cross-examination, the People legitimately could have sought to pursue the matter. As it is, however, this statement was elicited by the prosecution in the course of a wholly improper inquiry and accordingly cannot serve to justify that examination nunc pro tunc. The legitimacy of a particular line of cross-examination must be judged prospectively, not retroactively, in the sense that testimony obtained during a particular line of questioning may not be used as an ex post facto justification for that very line of inquiry if it was clearly improper at the time it was commenced. Thus, in the instant case, the fact that the prosecution's improper cross-examination ultimately elicited testimony which could itself have served as a basis for legitimate cross-examination had it been made in a different context, does not negate the undeniable fact that the trial court erred in allowing that initial inquiry (cf United States v Maverick, 601 F2d 921

Nor do I find any merit in the People's additional contention that the error in allowing the prosecution to cross-examine Savage about his silence was harmless. Although there was considerable evidence of guilt, there nonetheless remained a question of credibility for the jury as to the conflicting testimony concerning the details of the dispute between defendant and Johnson. In such a case, the assault upon defendant's credibility may well have played a significant part in the jury's ultimate determination that defendant was guilty. Especially is this true in light of the prosecutor's summation, which emphasized defendant's failure to tell the police his version of the facts following his arrest. Thus, I must conclude that there does exist a reasonable possibility that this constitutional error contributed to defendant's conviction (see People v Crimmins, 36 NY2d 230).

In light of my conclusion that defendant is entitled to a new trial on this ground, I deem it unnecessary to consider any of defendant's other contentions.

Accordingly, I vote to reverse the order appealed from and to remit the case to Supreme Court, Bronx County, for a new trial.

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Order affirmed. Opinion by Fuchsberg, J. All concur, Cooke, Ch.J., in a separate opinion; except Gabrielli, J., who dissents and votes to reverse in an opinion in which Wachtler, J., concurs.

Decided July 3, 1980

Supreme Court, U.S.
FILED
JUN 4 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1751

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

THOMAS CONYERS,

Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

PETITIONER'S REPLY

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PETITIONER'S REPLY

In opposition to the petition for certiorari, respondent argues that the decision below rested on an independent state ground. This very argument was made in opposition to the motion to amend the remittitur. That argument was rejected by the New York Court of Appeals when it amended its remittitur to reflect that it had necessarily decided a federal constitutional question. Certainly, if there were an alternative state ground requiring reversal, the court would not have stated that it was necessary to pass upon a question under the Federal Constitution. Con-

sequently, as this Court has oft recognized, by amending the remittitur, the New York Court of Appeals was expressly stating that reversal was mandated by the Federal Constitution and that reversal did not rest on any independent state ground. *See, e.g., St. Nicholas Cathedral* v. *Kedroff*, 302 N.Y. 1 (1950), *remittitur amended* 302 N.Y. 689 (1951), *rev'd* 344 U.S. 94, 97 (1952); *see generally* Wolfson and Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 Harv. L. Rev. 111 (1949). Moreover, as demonstrated in the petition (*see* pp. 11-12), and recognized by the court below in amending its remittitur, the so-called alternative ground involving the weighing of the probative value of silence against constitutional considerations is based squarely on the Federal Constitution regardless of whether that basis is the Due Process Clause or the fifth amendment.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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